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No.

In The Supreme Court of the United States

OCTOBER TERM, 1984

READING COMPANY
AND
CENTRAL JERSEY INDUSTRIES, INC., PETITIONERS

v.

JOSEPHINE SCHWEITZER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a reorganization court has the power to deal with and provide for latent future asbestos-related toxic tort claims as part of a reorganization of a debtor corporation under Section 77 of the Bankruptcy Act?

2. Whether, assuming that a reorganization court has such authority, the court may bar such future claims, where the rail operations out of which such claims arose are, during the course of the reorganization, transferred to a solvent successor railroad?

PARTIES TO THE PROCEEDING

The decision of the court of appeals was issued in 19 consolidated appeals. Petitioner Reading Company was an appellee in 16 of the appeals ("the Reading cases"), but was not a party to the other three appeals ("the CJI cases"). Josephine Schweitzer, Mildred Siebert, George A. Wentzel, Elaine Schwambach, Marilyn L. Frank, Martin H. Scholl, Earl R. Fenstermacher and Carl Scholing each were the named plaintiff in a separate trial court action to which Reading was a party, were appellants in separate appeals to the court of appeals, and are respondents herein. Consolidated Rail Corporation ("Conrail"), was a defendant in each of the eight separate underlying trial court actions involving Reading, was the appellant in eight separate appeals from those underlying actions, and also is a respondent herein. The Penn Central Corporation appeared in the court of appeals in the Reading cases as amicus curiae. Petitioner Central Jersey Industries, Inc., was an appellee in the remaining three appeals together with its predecessor, The Central Railroad Company of New Jersey, and its former Trustee, Robert D. Timpany. Andrew Thomas, Trudell Thomas, Frank Pongrac Sr., Robert A. Bingle, Alexander Redelico, Evelyn Redelico, Joseph C. Popadick, Elma Popadick, Edward Witos, Philomena Witos, Mark Gammel, Harry Guralchuk, Steve Palichak, Joseph M. Pinto, Frank Pongrac, Jr., John Sowizral, Harry Wilson, George J. Zeblisky, Robert J. F. Brobyn, and Richard Middleton were appellants in the CJI cases below and are respondents herein. Conrail was an intervenor in at least two of the CJI cases.

DESIGNATION OF CORPORATE RELATIONSHIPS

Reading Company is not owned by any parent corporation. Allentown Terminal Railroad Company, East Pennsylvania Railroad Company, Eastern Services, Inc., Ironton Railroad Company, and Pennsylvania - Reading Seashore Lines are subsidiaries of Reading. Reading does not have an ownership interest in any other subsidiary (excepting only wholly owned subsidiaries). Reading is involved in a joint venture with Combustion Engineering, Inc.

Central Jersey Industries, Inc., is not owned by any parent corporation. CJI has a majority ownership interest in the Dover & Rockaway Railroad Company and the Mount Hope Railroad Company. CJI does not have an ownership interest in any other subsidiaries (excepting only wholly owned subsidiaries). CJI is an affiliate of Triangle Industries, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Reading Company and Central Jersey Industries, Inc. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra*, 1a-18a) is reported at 758 F.2d 936. The opinion of the district court in the Reading cases (App. *infra* 19a-26a) is reported at 36 Bankr. 469. The opinion of the district court in the CJI cases (App. *infra* 38a-44a) is reported at 38 Bankr. 686.

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1985 (App. *infra*, 53a-59a). A petition for rehearing in the CJI cases was denied on April 26, 1985 (App. *infra* 60a-61a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of Section 77 of the Bankruptcy Act of 1898 are set forth in a statutory appendix (App. *infra*, 100a-110a).

STATEMENT

On November 23, 1971, Reading Company, which was then a railroad engaged in interstate commerce, filed a petition for reorganization under Section 77 of the Bankruptcy Act of 1898 (the "Bankruptcy Act"), formerly 11 U.S.C. § 205 (App. *infra*, 21a). The Central Railroad Company of New Jersey ("CNJ") had filed a similar petition on March 22, 1967 (App. *infra*, 38a). Reading and CNJ were among several major railroads in the Northeast region that filed for reorganization at approximately that time. While Reading and CNJ were in reorganization, Congress passed the Regional Rail Reorganization Act of 1973 (the "Rail Act"), 45 U.S.C. §§ 701-794, to preserve the vitally important Northeast rail transportation system in the face of the serious financial crisis caused by the bankruptcies of petitioners and the other major Northeast railroads. The Rail Act established a method for preserving the Northeast rail lines by transferring the rail assets of the Northeast railroads in reorganization to the newly formed Consolidated Rail Corporation ("Conrail"), and at the same time provided

for the liquidation or reorganization of the remaining assets of such railroads, which had been incapable of reorganizing as railroads on an income basis as provided under Section 77 of the Bankruptcy Act.

The first step under the Rail Act procedure is a judicial determination that the debtor railroad is incapable of an income-based reorganization. *See* 45 U.S.C. §717(b). Following such a determination, the Rail Act requires the debtor railroad to divest itself of all rail related property and interests and to convey such property and interests to Conrail. After conveying all of its railroad properties and interests to Conrail, the debtor railroad may then either liquidate its remaining assets or formulate a plan of reorganization to benefit its creditors and enable it to achieve a fresh start. *See* 45 U.S.C. §791.

The Honorable J. William Ditter, Jr. of the United States District Court for the Eastern District of Pennsylvania presided over the Reading reorganization proceedings. After the Rail Act became effective, Judge Ditter made the requisite review of Reading's prospects for an income-based reorganization and determined that Reading could not successfully be reorganized as a railroad. *In re Reading Company*, 378 F.Supp 474 (E.D. Pa.), 478, *aff'd*, 384 F.Supp. 895 (Regional Rail Reorg. Ct. 1974). As a consequence of this finding, Reading was required to transfer all of its rail properties and interests to Conrail.

On April 1, 1976, Reading conveyed all of its rail properties and interests to Conrail. These properties and interests included the real estate comprising the Reading rail system, all designated rail assets, all track and other track materials, all books and records, including employee records, all furniture, supplies, and equipment, and other current assets. In accordance with the provisions of the Rail Act, Conrail offered employment to all

former active Reading employees. As of April 1, 1976, Reading ceased to operate as a railroad.[1] The only assets that Reading retained following the conveyances to Conrail were certain non-rail properties, a trucking company, some marine equipment, other investments, a claim against Conrail and the United States for the value of the assets that were transferred, and its federal income tax net operating loss carry-forwards ("NOL's").

In due course, Reading's Trustees formulated a plan of reorganization with respect to Reading's remaining assets (the "Reading Plan"). The Trustees presented the Reading Plan in its final version to Judge Ditter on June 25, 1979. The Reading Plan was modeled after the Penn Central plan of reorganization, and was structured to preserve one of Reading's principal assets, the federal NOL carry-forwards.

Judge Ditter approved the Reading Plan on May 21, 1980 and confirmed the Reading Plan on September 25, 1980, following a vote of Reading's creditors (App. *infra*, 23a). Pursuant to Order No. 2004 of the Reorganization Court (the "Consummation Order"), the Plan was consummated on January 1, 1981 *(Id)*. In accordance with the Consummation Order, the books and accounts of the former Reading Company were closed at 11:59 p.m. E.S.T., on December 31, 1980, and the books and accounts of the reorganized Reading Company were opened at 12:00 a.m., E.S.T., on January 1, 1981 *(Id)*. The Consummation Order further provided that the assets of the former Reading were transferred to the reorganized Reading free and clear of any and all claims of the former Reading, its creditors, claimants, and stockholders. In addition, the Consummation Order provided that the

[1] Pursuant to the express provisions of the Rail Act, Reading and CNJ continued to be reorganized under the railroad reorganization provisions of Section 77 of the Bankruptcy Act. *See* 45 U.S.C. § 791.

former Reading and its Trustees were discharged and released forever from any and all claims (App. *infra*, 24a).

CNJ was also required to convey substantially all of its rail properties to Conrail on April 1, 1976 and subsequently formulated a Plan of Reorganization (the "CNJ Plan") based upon its retained assets, which were comprised of cash, certain non-rail properties, its claim under the Rail Act and significant NOL's. It was reorganized as Central Jersey Industries, Inc. ("CJI") on September 14, 1979 (App. *infra*, 38a).

Following consummation of the Reading Plan, several former Reading railroad workers and representatives and survivors of former Reading railroad workers (hereinafter referred to collectively as "the Reading plaintiffs") filed personal injury actions against Conrail and the reorganized Reading, purporting to assert claims arising under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51-60, and related statutes. The plaintiffs are seeking to recover for injuries allegedly related to the railroad workers' exposure to asbestos, which injuries were latent before and became manifest after the transfer of the rail assets by Reading to Conrail and the Reading Consummation Order. In each of the Reading cases, Reading moved to dismiss on the basis that the plaintiffs are barred by the Consummation Order or otherwise from asserting their claims against the reorganized Reading. The plaintiffs and Conrail opposed Reading's motions. The various FELA and related actions were transferred to Judge Ditter for purposes of adjudicating the motions to dismiss. By an Opinion and Order dated January 10, 1984, Judge Ditter granted Reading's motions, finding that the plaintiffs' claims were barred by the Consummation Order and had been discharged in the Reading reorganization proceedings (App.

infra, 19a-28a). Judge Ditter then transferred the cases back to the various judges to whom they originally had been assigned. Those judges entered final judgments pursuant to Rule 54(b), finding that Judge Ditter's ruling was a final decision as to Reading's rights and liabilities and that there was no just reason to delay entering judgment in Reading's favor (App. *infra*, 29a-37a).

Central Jersey Industries, Inc. was also sued under the FELA and related statutes following its reorganization by a number of former CNJ railroad employees (hereinafter referred to as the "CJI plaintiffs"). Central Jersey Industries, Inc. obtained an injunction against the prosecution of such suits from its reorganization court on the ground that the claims were barred by its Consummation Order and had been discharged in the reorganization proceedings (App. *infra*, 38a-52a).

The Reading plaintiffs, the CJI plaintiffs, and Conrail appealed to the United States Court of Appeals for the Third Circuit. The court of appeals reversed the judgments of the district courts and remanded the various cases for further proceedings (App. *infra*, 1a-18a, 53a-59a). The court held "that, as a matter of federal law, F.E.L.A. actions for asbestos-related injury do not exist before manifestation of injury." (App. *infra*, 14a).

From this premise that the plaintiffs' FELA causes of action did not exist until after the date of the Consummation Orders, the court of appeals concluded that the reorganization courts lacked the power to discharge plaintiffs' claims because their FELA claims were not claims "within the meaning of section 77." (App. *infra*, 8a). The court rejected the argument that the broad language of Section 77(b), which defines "claims" as, *inter alia*, "interests of whatever character", includes a person holding a contingent asbestos-related FELA claim (App. *infra*, 14a-15a). The court held that plaintiffs, at

the time of alleged exposure, had "no legal relationship" with their employers from which an "interest", within the meaning of Section 77, could flow (App. *infra*, 15a).

On June 16, 1985, Circuit Judge Robert B. Krupansky, who presided over the Erie Lackawanna reorganization prior to his elevation to the Sixth Circuit and who continues to do so by designation, entered an order expressly declining to follow the decision of the court of appeals in these cases and holding that "the discharge [of Erie Lackawanna] under Section 77 and the Bankruptcy Act is an absolute bar to the post confirmation [FELA and other] claims asserted herein." *In re Erie Lackawanna Railway Co.*, No. B72-2838, slip op. (N.D. Ohio June 18, 1985) (App. *infra*, 62a, 87a-88a).

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the power of a reorganization court to deal with claims attributable to exposure to occupational diseases, such as asbestosis and mesothelioma, that are characterized by long latency periods.[2] The court of appeals, in an essentially contemporaneous decision, recognized the power of a reorganization court to deal with such claims by approving the appointment of a guardian ad litem to represent latent future asbestos-related claimants in the reorganization proceedings. *See In re Amatex Corporation*, 755 F.2d 1034 (3d Cir. 1985). But in the present

[2] For purposes of this Petition, "exposure" refers to the time or times at which an individual comes in contact with asbestos fibers. "Manifestation" refers to the development of clinically recognizable symptoms of a disease. "Latency period" refers to the time between exposure and manifestation. "Latent" or "subclinical" refers to the state of an injury as it exists prior to manifestation. "Latent future claim" refers to a potential claim for injuries that are latent at a given time, but are expected to manifest in the future.

cases, the Court of Appeals has vitiated its essentially concurrent decision in *Amatex* by holding that a reorganization court is powerless to deal with the rights of latent future claimants arising out of preconsummation tortious conduct by the debtor. As stated by Judge Krupansky: "The Third Circuit failed to address the apparent contradiction between its decisions in *Amatex* and *Schweitzer*." *See Erie Lackawanna* (App. *infra*, 79a).

This "severely constrict[ed]" (as characterized by Judge Krupansky, App. *infra*, 72a) view of the powers of a reorganization court is strikingly inconsistent with the decisions of this Court under the Bankruptcy Act, which have repeatedly emphasized, particularly in railroad reorganizations under Section 77, the broad and flexible powers of a reorganization court. From a practical point of view, the decision of the court of appeals will severely handicap future reorganization courts in dealing with latent future toxic tort claims, and will heavily bias future reorganizations in the direction of straight liquidations, leaving future tort claimants with no viable recourse against either the debtor or the sold assets. Straight liquidation is, moreover, inconsistent with both the obvious Congressional purpose in fashioning the reorganization provisions of the bankruptcy laws and with this Court's repeated statements that a principal goal of bankruptcy administration is the maximization of the value of the estate. Finally, the decision of the court of appeals ignores the legitimate expectations of participants in the long and difficult process of negotiating an equitable plan of reorganization, and destroys the finality and certainty necessary to promote the compromise of diverse creditors' claims.

1. Rather than dealing with any of the subsidiary issues presented in these cases, the court of appeals based its decision upon its holding that a reorganization court

lacks the power to deal with the claims of employees and former employees of the debtor who have suffered only subclinical injury from occupational exposure to asbestos. In so doing, the court of appeals ignored: a) the holdings of this Court that the power of a reorganization court to deal with claims is unaffected by the precise time - pre or post reorganization - when the affected cause of action is deemed to have technically "arisen" under the underlying substantive law; b) the sweeping and expansive language used by Congress in Section 77; and (c) the teachings of this Court that bankruptcy law gives "assurance of a remedy that can be moulded and adapted to the needs of the occasion." *Brown v. O'Keefe*, 300 U.S. 598, 605 (1937).

a. This Court has consistently held that a bankruptcy court has the power to deal with a potential future claim at a time before it has technically "arisen" under the underlying substantive law. *See, e.g., Maynard v. Elliott*, 283 U.S. 273 (1931) (endorser of unmatured promissory note); *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549 (1915) (surety which has not yet performed under matured bond).

b. Moreover, in Section 77(b) of the Bankruptcy Act, former 11 U.S.C. §205(b), Congress employed definitions of "claims" and "creditors" which this Court has characterized as "sweeping" and "all-inclusive". *Gardner v. New Jersey*, 329 U.S. 565, 573, 575-76 (1947). Section 77(b) defines "creditors" as "all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act." (App. *infra*, 101a). "Claims" are defined to include "debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." (App. *infra*, 101a-102a). In *Gardner*,

this Court observed that "[w]hen §77 is read against this historical background and in light of practical requirements, we cannot conceive that Congress gave the reorganization court power less replete than the sweeping language of §77 suggests." 329 U.S. at 577-78. A fair reading of the phrase "other interests of whatever character" must include any inchoate interest arising under the FELA and related statutes possessed by an employee of a rail carrier at the time he or she suffers subclinical injury due to occupational exposure to asbestos. While it is a question of first impression in this Court, the commentators have had no difficulty in concluding that contingent tort claims are within the scope of Section 77(b). *See* 5 *Collier on Bankruptcy* ¶77.20 at 602 (14th ed. 1978); Note, *Relief From Tort Liability Through Reorganization*, 131 U. Pa. L. Rev. 1227, 1245 (1983) (bankruptcy courts possess the power to consider future tort claims and fashion appropriate relief consistent with the purposes of reorganization).

The court of appeals, however, departed from the clear language of Section 77 by holding that a "legal relationship" was required in addition to "interests of whatever character" set forth in Section 77 (App. *infra*, 15a). After imposing this non-statutory requirement, the court of appeals then held, without any factual support in the record, that employees have "no legal relationship" with their employer from which an "interest", within the meaning of Section 77, could flow (App. *infra*, 15a). *See Erie Lackawanna* (App. *infra*, 73a-74a), wherein Judge Krupansky stated:

> "Thus, by emphasizing the injury element of the FELA tort claims and ignoring the express definitions of "claim" and "creditor", and further by mandating the manifestation of injury as a prerequisite to the existence of a "claim" or "right" cognizable in

> bankruptcy, the Third Circuit literally read into the Section 77 definitions of "claim" and "creditor" the provability and "right to payment" requirements that had been expressly deleted from those definitions.
>
> * * * *
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> The argument, [that employees had no "legal relationship" with their employer], however, ignores the statutory "legal relationship" imposed by the FELA upon former railroad employers to provide their employees with a safe place to work."

c. Aside from Section 77(b) itself, the general teachings of this Court dictate that the court of appeals erred in holding that the reorganization court lacked the power to deal with future tort claims arising from preconsummation exposure. In upholding Section 77 itself, the Court stated that "[f]rom the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power." *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry Co.*, 294 U.S. 648, 668 (1935). In *Brown v. O'Keefe*, this Court held that "the malleable processes of courts of bankruptcy give assurance of a remedy that can be moulded and adapted to the needs of the occasion." 300 U.S. at 605. The decision of the court of appeals, however, denies to a reorganization court the power to mould and adapt a remedy to the massive problem of asbestos-related injuries.

2. The present petition presents this Court with an opportunity to deal with an important and recurring question of bankruptcy law which otherwise may not be decided by this Court for a substantial number of years.

a. Asbestos personal injury litigation is a major national problem. A 1983 Rand Corporation study cites estimates placing the number of deaths expected over

the next 30 years from asbestos-related causes at from 74,000 to 265,000. J. Kakalik, P. Ebener, W. Felstiner, M. Shanley, *Costs of Asbestos Litigation*, 3 (1983) (App. *infra*, 89a-99a, 91a). It has been estimated that by the end of 1982 about $1 billion in compensation and litigation expenses had been spent on more than 20,000 open and closed asbestos claims and that costs to close current claims were running at a rate of more than $100,000 per claim. *See Oversight on Occupational Disease, 1984: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor & Human Resources*, 98th Cong., 2nd Sess. 109, 124 (1984) (Prepublication copy of an executive summary of Rand Corporation study entitled *Variation in Asbestos Litigation Compensation and Expenses* (April 19, 1984)).

b. This massive and unexpected flood of personal injury claims has caused several major corporations to seek relief under the federal bankruptcy laws. See *In re Amatex Corp.*, No. 82-05220K (Bankr. E.D.Pa.); *In re Johns-Manville Corp.*, Nos. 82 B 11656 - 82 B 11676 (Bankr. S.D.N.Y.); *In re UNR Industries, Inc.* Nos. 82 B 9841 - 82 B 9851 (Bankr. N.D. Ill.). The central issue in these proceedings is precisely the issue presented here - whether a reorganization court has the power to deal with future tort claims for latent asbestos-related injuries. The various reorganization courts have differed as to whether they possess such power. *See In re Amatex Corp.*, 30 Bankr. 309 (Bankr. E.D.Pa.), *aff'd*, 37 Bankr. 613 (E.D.Pa.1983), *rev'd*, 755 F.2d 1034 (3d Cir. 1985); *In re Johns-Manville Corp.*, 36 Bankr. 743 (Bankr. S.D.N.Y.1984), *appeal denied*, 39 Bankr 234 (S.D.N.Y.1984), *appeal permitted*, 45 Bankr. 833 (S.D.N.Y. 1985); *In re UNR Industries, Inc.*, 29 Bankr. 741 (N.D. Ill. 1983), *appeal denied*, 725 F.2d 1111 (7th Cir. 1984), *on reference*, 46 Bankr. 671 (Bankr. N.D. Ill. 1985). The

decision of the Court of Appeals for the Third Circuit is the only appellate decision on this question, and it holds that a reorganization court lacks the power to fashion a remedy for future latent tort claimants. Given the preliminary status of the Manville, et al. proceedings, and the many years required to finalize a plan of reorganization, it is unlikely that this Court will have the opportunity - other than in these cases - to address this question for several years.[3]

c. Unless corrected by this Court, the decision of the court of appeals will have precedential impact upon these other reorganization proceedings. Unlike the Bankruptcy Act, the Bankruptcy Code contains in Section 101 a single unified set of definitions applicable to all proceedings under the Code. *See* 11 U.S.C. §101. Thus the railroad reorganization and the corporate reorganization provisions are now on a common footing as to the technical definitions of "claim," "creditor," etc.[4] Accordingly, the decision of the court of appeals, unless this Petition is granted, is likely to be, for some time, the

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[3] The *Amatex* opinion was filed on February 22, 1985. A Petition for Rehearing was denied on April 2, 1985. The time for filing a Petition for Certiorari in the *Amatex* case, therefore, runs until on or about July 1, 1985, after the filing date of this Petition. Although a Petition for Certiorari has not yet been filed in the *Amatex* case, counsel for petitioners in this case have been informed that at least one of the parties in the *Amatex* case intends to file such a Petition. If so, this Court will be provided with the unique opportunity to address both the power of a reorganization court to deal with latent future tort claims and the manner of doing so.

[4] While it is true that the legislative history of § 101 of the Code indicates that the draftsmen intended that the Code definition of "claim" would be "even broader . . . than is found in the present debtor rehabilitation chapters," S. Rep. No. 989, 95th Cong., 2nd Sess., 21-22, this can be read as a general reference to differences under the Bankruptcy Act between, e.g., straight bankruptcy under Chapter VII, §§ 61-72 (former 11 U.S.C. §§ 101-112), and the re-

only appellate decision with respect to the power of a reorganization court to deal with the problem of asbestos-related cases. As long as the court of appeals' decision in these cases stands, the Amatex, Manville and UNR reorganization courts will, at best, be laboring under a presumption that they are powerless to deal with the central issues in their respective reorganizations.

3. Until corrected, the decision of the court of appeals will impermissibly bias many reorganizations in favor of straight liquidations, thus destroying NOL values and leaving latent future asbestos-related claimants with *no* entity available to satisfy their claims. If a reorganization court is powerless to protect the reorganized corporation from large and uncertain future toxic tort claims, a "nuts and bolts" asset sale may be the only alternative. The decision of the court of appeals was unnecessary to protect the interests of the plaintiffs in these rail reorganization cases and will prejudice the interest of asbestos-related claimants in non-rail reorganizations.

a. This Court has repeatedly made clear that the duty of a trustee in bankruptcy is to "maximize the value of the estate." *Commodity Futures Trading Comm'n v. Weintraub*, _____ U.S. _____, 105 S.Ct. 1986, 1993 (1985). *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 584 (1935). Consistent with these teachings of this Court, the reorganization courts in the Rail Act cases recognized the large values inhering in the continued corporate existence of the debtor railroads. In particular, many of the railroads in reorganization possessed

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organization "chapters" such as Chapter X, §§ 101-276 (former 11 U.S.C. §§ 501-676), and Chapter XI, §§ 301-399 (former 11 U.S.C. §§ 701-799). In any case, the outer reach of the definitions of "claims" and "creditors" for bankruptcy purposes has doubtless been set by the "sweeping, all-inclusive" definitions employed by Congress in § 77(b) of the Bankruptcy Act. *Gardner*, 329 U.S. at 573.

large net operating loss (NOL) tax loss carry-forwards, which had the potential to become a valuable asset of the reorganized corporation by sheltering post-reorganization operating profits of newly-acquired businesses. As early as 1973, the NOL's in bankruptcy of Penn Central Transportation Company had reached "approximately $851 million," *Blanchette v. Connecticut General Insurance Corps.* 419 U.S. 102, 124 (1974), and by 1975 had reached "$1.8 billion," *In re Penn Central Transportation Co.*, 596 F.2d 1127, 1138 (3d Cir. 1979). These NOL's constituted the second largest asset of Reading's estate at the date of consummation, after its claim for the value of the property transferred to Conrail. The reorganization court was fully aware of "the debtor's huge tax-loss carry-forwards." *In re Penn Central Transportation Co.*, 458 F. Supp. 1364, 1374 (E.D. Pa. 1978), *aff'd in part, remanded in part*, 596 F.2d 1102 (3rd Cir. 1979).

These huge NOL's were valuable in reorganization because they could be retained by the reorganized corporation, with equity in the reorganized corporation reflecting their value being distributed to creditors of the debtor to satisfy their claims. To protect the value of Reading's NOL's, and out of concern that the distribution of large amounts of equity in a new corporation to the creditors of the old corporation would result in the characterization of the new corporation as not a continuation of the debtor corporation for purposes of the NOL carryforward (see 26 U.S.C. §§381-383 (Carryovers) and regulations thereunder) and for the "purposes of convenience, simplicity and economy", the Reading Plan provided that the remaining unliquidated assets of the debtor be conveyed en bloc to the "Reorganized Company." The CNJ Plan also provided for transfer of the debtor's remaining assets en bloc to CJI and the distribution of securities of the reorganized company. In this manner,

the reorganization courts carried out their duty to maximize the values available for creditors.

b. The alternative to the procedure actually used would be a sale of the individual assets of the debtor's estate on a "nuts and bolts" basis as opposed to an "en bloc" or going concern basis. A "nuts and bolts" sale of assets would decrease the value of the debtor's estate, as described in section a., *supra*, and otherwise, and would essentially preclude future tort claimants from the opportunity to satisfy their claims. Such a sale would not result in any successor to the business of the debtor, which might be liable under the principles of successor business liability. *Cf. Knapp v. North American Rockwell Corp.*, 506 F.2d 361 (3d Cir.) *cert. denied*, 421 U.S. 965 (1975). The district court in *In re UNR Industries, Inc.*, 29 Bankr. at 744, 748 recognized that the effect of a limitation on the power of the reorganization court such as that imposed by the court of appeals in this case, will be that "debtors will have no choice but to liquidate" and that the latent future toxic tort claimants "may wind up with judgments against corporations left with only one asset: a corporate charter."

c. The decision of the court of appeals was unnecessary to protect the interests of the plaintiffs in these rail reorganization cases and will prejudice the interests of asbestos-related claimants in non-rail reorganizations. In these rail reorganization cases, under established principles of successor liability, Conrail is liable to the plaintiffs. In the case of the Erie-Lackawanna, for example, the debtor is being entirely liquidated and will disappear completely. See *Erie Lackawanna* (App. *infra*, 63a) ("It is not inconceivable and perhaps more probable that the Debtor as reorganized may cease to exist in the not too distant future."). Congress could hardly have intended to exempt Conrail from the normal rules of successor

liability and thus leave former Erie-Lackawanna rail employees with a claim only against an empty shell. In the rail industry generally, the future costs of past occupational exposure to asbestos will be paid by the carriers and passed on to future users of rail service.[5]

Claimants in non-rail reorganizations will not have the same opportunity. As set forth in section 2., *supra*, the decision of the court of appeals, unless corrected, will have substantial precedential influence upon other pending non-rail reorganization proceedings. If liquidation is ordered - or if it occurs post-consummation before the latent asbestos-related injuries manifest themselves - there

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[5] In the court of appeals, Conrail argued that various issues directly or collaterally affecting it are within the exclusive jurisdiction of the Special Court under the Rail Act. Conrail's assertion of exclusive Special Court jurisdiction confuses transactional issues with status issues. At most, the Special Court may have exclusive jurisdiction to interpret the effect of Section 709(b) of the Rail Act, 45 U.S.C. § 797h(b), on the documentation associated with the transactions represented by the April 1, 1976 asset transfers to Conrail ordered by the Special Court, e.g. whether any "claims arising prior to the date of conveyance," against the debtor estates attached to Conrail. (In these cases, of course, Conrail argues that any liability to the plaintiffs did not exist in 1976, but arose later when the plaintiffs' alleged illnesses became manifest.) Assuming, *arguendo*, that the Special Court were to hold that under Section 709(b) no such liability was assumed, all that would be accomplished, as in *Knapp*, 506 F.2d at 361-73, would be a determination that the parties to the transactions did not intend a transfer of liability for future torts based on past conduct. But in *Knapp* liability was nevertheless found based on the status of the defendants as the current operators of the line of business which caused the injury. Under Section 301(b) of the Rail Act, 45 U.S.C. § 741(b), Conrail has the status of the Pennsylvania business corporation which it is, engaged in interstate rail operations, and there is no suggestion anywhere that the Special Court has exclusive jurisdiction over matters arising from Conrail's status as a business corporation operating a railroad. Otherwise these present FELA cases and related cases, and similar cases in the future would themselves be caught up in the Special Court's putative exclusive jurisdiction.

will be no successor or other entity against which the claimants may prosecute their claims.

4. The decision of the court of appeals, by undermining the principle of finality in bankruptcy, discourages the development of compromise settlements and is contrary to the justifiable reliance of the creditors who voted for the Reading and CNJ plans of reorganization.

a. One of the duties of a reorganization court is to promote compromise of claims so that interminable litigation may be ended. *Gardner*, 329 U.S. at 581. A trustee can fashion, and a reorganization court can approve, a plan of reorganization only if a termination of all liabilities of the debtor may be safely assumed by all parties since creditors will compromise claims and accept securities of the reorganized company only if they know that "the plan was final . . ." *Duryee v Erie Railroad Co.*, 175 F.2d 58, 63 (6th Cir.), *cert. denied*, 338 U.S. 861 (1949). Both Judge Ditter in the Reading cases (App. *infra*, 19a-26a) and Chief Judge Fisher in the CJI cases (App. *infra*, 38a-44a) expressly adverted to and relied upon these considerations in reaching the decisions reversed by the court of appeals. Most recently, Circuit Judge Krupansky in the Erie Lackawanna proceedings relied on "the finality historically accorded consummated reorganization plans and final discharge orders" in holding that a discharge under Section 77 absolutely bars post discharge claims, including those of the type involved in these cases. *Erie Lackawanna* (App. *infra*, 66a). Each of the three district courts that participated firsthand as reorganization court judges in the "[a]rduous, exhaustive and comprehensive negotiations and compromise" necessary to formulating a fair and equitable plan of reorganization, when faced with the questions presented here, have chosen not to "forever [destroy] the full faith and credit of the [Bankruptcy] Act by decimat-

ing the incentive of certainty and finality upon which debtors, their creditors and security holders of necessity [rely]." *Id.* (App. *infra*, at 63a, 68a).

b. The decision of the court of appeals destroys the justifiable reliance of all the creditors of Reading and CNJ - both large and small (including personal injury claimants) - in accepting the plans of reorganization. In accepting the plans and in accepting securities in the reorganized company, these creditors believed that the value of the securities would not be impaired by requiring the reorganized company to pay post-consummation claims. At an earlier point, in reviewing the Penn Central plan of reorganization, the court of appeals stressed the importance of the "complex series of compromises affecting the rights of numerous classes of claimants with various priorities of claims" to the success of the reorganization, and held that further delay would "place an even more crushing burden on the parties to this litigation." *In re Penn Central Transportation Co.*, 596 F.2d at 1141. But the validity of that decision has been impaired by this decision of the court of appeals since the "complex series of compromises" in order to achieve finality may be rendered nugatory by allowing these massive and uncertain claims to erode the value of securities accepted by the creditors.

This danger is especially acute as to petitioners. As both reorganization courts recognized, there is no provision in the capital structure of either petitioner for the large, uncertain and protracted toxic tort liabilities implicit in the approach dictated by the court of appeals. Unless rectified, the decision of the court of appeals will destroy the legitimate expectations of the participants in the Rail Act reorganization proceedings and will cripple prospects for negotiated settlements in pending and future railroad and corporate reorganizations.

SUGGESTION FOR REMAND

As an alternative to plenary consideration of these cases, but with a view to the elimination of the precedential effect of the decision below of the court of appeals, the Court may wish to grant the petition in the exercise of its supervisory powers and remand with instructions to vacate the judgment of the court of appeals and remand the Reading cases to the district court for consideration of a motion for summary judgment (which Reading Company here represents that it will promptly file and prosecute) on the ground that Reading Company, as a non-carrier, is not a proper party defendant in these FELA actions. The court of appeals has held that the FELA actions involved in these cases "arose" at a time when Reading Company was a non-carrier and another carrier (Conrail) had succeeded to the rail operations of the former debtor by reason of court-ordered transfers on April 1, 1976 of its rail properties and personnel under the Rail Act. Remand is necessary because the individual plaintiffs have each alleged that the reorganized Reading Company was a carrier at the time of manifestation of symptoms, although in all cases the earliest manifestation times alleged are subsequent to the April, 1, 1976 conveyances to Conrail. *See Railway Labor Executives Ass'n v. Gibbons*, 455 U.S. 457, 468 (1982) (Carrier in liquidation arguably has no remaining common carrier responsibilities).

In view of the different procedural posture of the CJI cases, CJI could not move for summary judgment in its reorganization court. This Court, however, may wish to remand the CJI cases and direct the reorganization court to modify its injunctions to permit the filing of motions for summary judgment on the same grounds as Reading (which motions CJI here represents that it will promptly file and prosecute).

Petitioners have not previously asserted such a defense because prior to the decision of the court of appeals in these cases it had been petitioners' position that the FELA and related causes of action relate back to the time of exposure, i.e., to a period during which the debtor or its predecessor was an operating carrier. A decision holding that an FELA action cannot be maintained against a non-carrier in this particular situation (where Conrail is present as the solvent operator of the continuing business of the common carrier) would moot the reorganization issues decided by the court of appeals in these cases.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1086

SCHWEITZER, JOSEPHINE,
Appellant,

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
AND
THE READING COMPANY

(Civil No. 81-5375, E. D. of Pa.)

No. 84-1087

SEIBERT, MILDRED, Individually and as Executrix of the Estate of Seibert, Paul D., Deceased,
Appellant,

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
THE READING COMPANY

(Civil No. 81-5376, E. D. of Pa.)

No. 84-1088

WENTZEL, GEORGE A.,
Appellant

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
AND
THE READING COMPANY

(Civil No. 82-1683, E. D. of Pa.)

No. 84-1089

ELAINE SCHWAMBACH, Executrix of the Estate of Woodrow W. Schwambach and Merlin Schwambach, Executor of that Estate,

Appellants

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
AND
THE READING COMPANY

(Civil No. 82-2467, E. D. of Pa.)

No. 84-1108

FRANK, MARILYN L., as Executrix of the Estate of Russell C. Wennell, deceased,

Appellant

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
AND
THE READING COMPANY

(Civil Action No. 82-2999, E. D. of Pa.)

No. 84-1132

SCHOLL, MARTIN H., Individually and as Executor of the Estate of Ethel M. Scholl, deceased,

Appellant

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
AND
THE READING COMPANY

(Civil Action No. 84-1685, E. D. of Pa.)

Nos. 84-1203 and 84-1204

FENSTERMACHER, EARL R., and SCHOLING, CARL,

v.

CONSOLIDATED RAIL CORPORATION, a corporation, and THE READING COMPANY, a corporation

v.

ANCHOR PACKING COMPANY, CELOTEX CORPORATION, successor-in-interest to Philip Carey Manufacturing Company, Philip Carey Corporation, Briggs Manufacturing Company and/or Panacon Corporation, CERTAINTEED CORPORATION, DUROX EQUIPMENT COMPANY, GARLOCK, INC., JANOS INDUSTRIAL INSULATION CORPORATION, JOHN CRANE-HOUDAILLE, INC., J. V. ROBERTS LTD., KEENE CORPORATION, NICOLET, INC., NOSROC CORPORATION, successor-in-interest to G. & W. H. Corson, Inc. and Calcite Quarry Corporation, STUDEBAKER-WORTHINGTON, INC., TANNETICS, INC., TURNER & NEWALL PLC, TURNER ASBESTOS FIBERS LTD., UNION RUBBER, INC. and VELLUMOID COMPANY

Third Party Defendants

EAGLE PICHER INDUSTRIES, INC. and FLINTKOTE COMPANY

Fenstermacher, Earl R.,
Appellant in No. 84-1203
(D. C. Civil No. 82-4923)

Scholing, Carl,
Appellant in No. 84-1204
(D. C. Civil No. 82-1684)

(Civil Nos. 82-4923 and 82-1684, E. D. of Pa.)

Nos. 84-1116, 84-1117, 84-1118,
84-1119, 84-1120, 84-1121

JOSEPHINE SCHWEITZER,

MILDRED SEIBERT, INDIVIDUALLY AND AS
EXECUTRIX OF THE ESTATE OF
PAUL D. SEIBERT, DECEASED

GEORGE A. WENTZEL
ELAINE SCHWAMBACH,
EXECUTRIX OF THE ESTATE OF
WOODROW W. SCHWAMBACH
AND MERLIN SCHWAMBACH,
EXECUTOR OF THAT ESTATE

MARILYN L. FRANK,
AS EXECUTRIX OF THE ESTATE OF
RUSSELL C. WENNELL, DECEASED

MARTIN H. SCHOLL, INDIVIDUALLY AND
AS EXECUTOR OF THE ESTATE OF
ETHEL M. SCHOLL, DECEASED

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
AND THE READING COMPANY

CONSOLIDATED RAIL CORPORATION, Appellant

(Civil Nos. 81-5375, 81-5376, 82-1683, 82-2467,
82-2999, 82-1685) E. D. of Pa.

Nos. 84-1160 and 84-1194

EARL R. FENSTERMACHER and CARL SCHOLING

v.

CONSOLIDATED RAIL CORPORATION, a corporation, and THE READING COMPANY, a corporation

v.

ANCHOR PACKING COMPANY, CELOTEX CORPORATION, successor-in-interest to Philip Carey Manufacturing Company, Philip Carey Corporation, Briggs Manufacturing Company and/or Panacon Corporation, CERTAINTEED CORPORATION, DUROX EQUIPMENT COMPANY, GARLOCK, INC., JANOS INDUSTRIAL INSULATION CORPORATION, JOHN CRANE-HOUDAILLE, INC., J. W. ROBERTS LTD., KEENE CORPORATION, NICOLET, INC., NOSROC CORPORATION, successor-in-interest to G. & W. H. Corson, Inc. and Calcite Quarry Corporation, STUDEBAKER-WORTHINGTON, INC., TANNETICS, INC., TURNER & NEWALL PLC, TURNER ASBESTOS FIBERS LTD., UNION RUBBER, INC. and VELLUMOID COMPANY,

Third Party Defendants

EAGLE PICHER INDUSTRIES, INC. and FLINTKOTE COMPANY

Consolidated Rail Corporation, Appellant

(Civil Nos. 82-4923 and 82-1684 - E. D. Pa.)

On Appeals from the United States District Court for the Eastern District of Pennsylvania

Nos. 84-5293 & 84-5310

In The Matter of:

THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY,

Debtor

Consolidated Rail Corporation,

Intervenor

Andrew Thomas and Trudell Thomas, his wife,

Appellants

Andrew Thomas and Trudell Thomas, Appellants in No. 84-5293

Intervenor Consolidated Rail Corporation,

Appellant in No. 84-5310

(B-67-401 - Dist. of N.J. - Newark)

On Appeal from the United States District Court for the District of New Jersey - Newark

No. 84-5451

In the Matter of:

THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY,

Debtor

Consolidated Rail Corporation,

Intervenor*

Joseph Pongrac, Sr., Robert A. Bingle, Alexander Redelico and Evelyn Redelico, h/w, Joseph C. Popadick and Elma Popadick, h/w, Edward Witos and Philomena Witos, h/w, Mark Gammel, Harry Guralchuk, Steve Palichak, Joseph M. Pinto, Frank Pongrac, Jr., John Sowizral, Harry Wilson, George J. Zeblisky, Robert J. F. Brobyn, Richard Middleton and any and all persons acting on their behalf, Appellants

(B-67-401 - Dist. of N.J. - Newark)

On Appeal from the United States District Court for the District of New Jersey - Newark

Argued: December 13, 1984

Before: SEITZ, GARTH, and HIGGINBOTHAM, Circuit Judges.

(Opinion Filed: March 29, 1985)

* Our reading of the record indicates that Consolidated Rail Corporation is not a party in No. 84-5451.

OPINION OF THE COURT

SEITZ, Circuit Judge.

These appeals, in the various procedural postures set forth in Part I, *infra*, call upon us to interpret § 77 of the Bankruptcy Act of 1898 ("section 77"), as amended, formerly codified at 11 U.S.C. § 205 (repealed 1978). Among the questions presented is whether a plaintiff in an asbestos-related personal injury action who had no manifest injury prior to the consummation date of his employer's reorganization in bankruptcy had a dischargeable "claim" within the meaning of section 77.

I.

Former railroad workers, representatives and survivors brought tort actions against The Reading Company ("Reading") and other defendants in the United States District Court for the Eastern District of Pennsylvania pursuant to the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.* (1982) ("F.E.L.A."). Subject matter jurisdiction existed pursuant to 28 U.S.C. § 1331 (1982) and 45 U.S.C. § 56 (1982).

Reading filed motions in each action to dismiss it as a party. These motions were opposed by plaintiffs and Consolidated Rail Corporation ("Conrail"), co-defendant in each of these actions. The motions were granted, express determinations were made that there was no just reason for delay, and, pursuant to Fed. R. Civ. P. 54(b), final judgments were entered in favor of Reading in each action. Plaintiffs and Conrail filed timely notices of appeal. This court has jurisdiction to review the judgments pursuant to 28 U.S.C. § 1291 (1982).

In addition, tort actions were brought in federal court against Central Jersey Industries, Inc. ("CJI") by former employees of Central Railroad Company of New Jersey ("CNJ") and their spouses pursuant to F.E.L.A. One similar action was brought in a New Jersey state

court. In response to these actions, CJI filed two separate petitions for relief in the United States District Court for the District of New Jersey. That court had presided over CNJ's reorganization under section 77. The district court had retained jurisdiction to consider such petitions in accordance with its equitable power "to secure or preserve the fruits and advantages of a judgment or decree entered therein." *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934). In one petition, CJI sought a declaration that the state court action was barred. It also sought an injunction seeking: (1) to restrain plaintiffs from prosecuting that action against CNJ, CJI, and Robert D. Timpany and (2) to require plaintiffs to dismiss as to those defendants. The second petition requested similar relief with respect to the federal court actions and, in addition, sought to restrain other former employees from commencing actions.

Conrail sought intervention to oppose the petition seeking relief against the state court plaintiffs, and the district court permitted intervention. The court then granted both of CJI's petitions and entered judgments to that effect. Timely notices of appeal were filed and this court granted a motion to stay the district court's injunction insofar as it enjoined the commencement of new actions and insofar as it ordered that the existing actions in federal court be dismissed. Appellate jurisdiction exists to review these judgments pursuant to 28 U.S.C. § 1291 (1982). *See Ex Parte Tiffany*, 252 U.S. 32 (1920).

II.

Reading and CNJ operated railroads before they reorganized in bankruptcy and divested themselves of their rail assets. Reading filed its bankruptcy petition on November 23, 1971, and transferred all of its rail assets to Conrail on April 1, 1976. The consummation date of

Reading's reorganization was December 31, 1980. CNJ filed its petition on March 12, 1967, transferred its rail assets on April 1, 1976, and the consummation date of its reorganization was September 14, 1979. Robert D. Timpany was the trustee of CNJ's assets during its reorganization. CJI is the company that resulted from that reorganization.

Subsequent to the consummation dates, a number of actions were brought against Reading, CNJ, CJI, and Timpany ("defendants"), alleging personal injury to former employees of Reading and CNJ as a result of exposure to asbestos in the course of their work for the railroads. Plaintiffs in those actions include former railroad employees, representatives, survivors, and spouses ("plaintiffs"). Plaintiffs allege that the asbestos-related injuries did not become manifest until after the relevant consummation dates. It is undisputed that, at this stage in the proceedings, plaintiffs' allegations must be accepted as true.

Defendants argued that plaintiffs' claims were discharged in the bankruptcy proceedings. Plaintiffs and Conrail argued, however, that these claims were not discharged. Further, they argued that those claims did not arise until after the consummation dates and that section 77 does not provide for discharge of such claims. They also argued that if section 77 did provide for discharge in these circumstances, it would violate due process. The district courts determined that plaintiffs' claims were properly discharged, and plaintiffs and Conrail appealed.

III.

Section 77(b) in pertinent part provides that a plan of reorganization "shall include provisions modifying or altering the rights of creditors." "Creditors" include "all holders of claims of whatever character against the debtor

or its property, whether or not such claims would otherwise constitute provable claims under this [Act]." "Claims" include "debts, whether liquidated or unliquidated . . ., or other interests of whatever character." 11 U.S.C. §205(b) (repealed 1978).

Section 77(f) provides that confirmation of the reorganization plan is binding upon "all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." Moreover, if the plan so provides,

> [t]he property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities.

11 U.S.C. §205(f) (repealed 1978).

The quoted statutory language clearly provides broad authorization for the discharge in bankruptcy of claims against the debtor in order to secure a fresh start for a company resulting from a section 77 reorganization. It is equally clear that plaintiffs' rights only could have been affected by the discharge of all "claims" against their employer if they had "claims" within the meaning of section 77 prior to the consummation date of their employer's reorganization.

The district courts in these cases were presented with the difficult question of whether plaintiffs, who allege that they were exposed to asbestos prior to their employer's reorganization and did not manifest any injury until after the relevant consummation dates, had "claims" that were discharged in the reorganization proceedings. The courts concluded in the affirmative, necessarily relying for this conclusion on the determination that plain-

tiffs did have dischargeable "claims" within the meaning of section 77. We shall now consider whether this determination was error.

The starting point for our analysis is the rule that a bankruptcy claim must be based on state or federal law that, "wholly apart from bankruptcy," creates substantive obligations. *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 170 (Frankfurter, J., concurring). *See Tate v. National Acceptance Company (In re* Leeds Homes, Inc.), 332 F.2d 648, 649-50 (6th Cir. 1964), *cert. denied*, 379 U.S. 836 (1964). Since plaintiffs' personal injury actions arise under F.E.L.A., any "claim" plaintiffs may have had prior to the consummation dates would have been based on the federal tort law provided pursuant to that statute.

It is undisputed that a cause of action in tort is a "claim" pursuant to section 77 so that if plaintiffs had causes of action that existed under F.E.L.A. prior to the relevant consummation dates they had "claims." Thus, taking as true plaintiffs' allegations that injury did not manifest until after the consummation dates, we must initially consider whether plaintiffs' F.E.L.A. claims existed before those dates.

Plaintiffs suggest that the United States Supreme Court's decision in *Urie v. Thompson*, 337 U.S. 163 (1949) mandates the conclusion that these actions did not exist until injury became manifest. *Urie* held that, for statute of limitations purposes, a F.E.L.A. action for personal injury resulting from the inhalation of silica dust accrues when silica-related injury manifests itself. Defendants do not agree that *Urie* controls. Assuming that the *Urie* rule is applicable to injury resulting from the inhalation of asbestos fibers, they argue that a cause of action may "exist" before it has "accrued" for statute of limitations purposes. *See In re UNR Industries, Inc.*, 725 F.2d 1111, 1119 (7th Cir. 1984), *dismissing appeal from*, 29 Bankr. 741 (N.D.Ill. 1983) (dicta suggesting that certain

asbestos-related causes of action may "exist" before they "accrue").

We assume, without deciding, that under certain circumstances a cause of action may withstand a motion to dismiss for failure to state a claim though the action has not "accrued" within the meaning of the relevant statute of limitations and, thus, a cause of action may "exist" before it has "accrued." Nevertheless, there is generally no cause of action in tort until a plaintiff has suffered identifiable, compensable injury. A leading treatise on tort law explains:

> Actual loss or damage resulting to the interests of another [is a necessary element of a negligence cause of action] . . . The threat of future harm, not yet realized, is not enough. Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered.

Prosser and Keeton on Torts (5th Ed. 1984) at 165 (footnotes omitted).

It is true that the possible existence of subclinical asbestos-related injury prior to manifestation may be of interest to a histologist. *See Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1218 (6th Cir. 1980), *clarified* 657 F.2d 814 (1981), *cert. denied*, 454 U.S. 1109 (1981). Likewise, the existence of such injury may be of vital concern to insurers and their insureds who have bargained for liability coverage triggered by "bodily injury." *See id.* We believe, however, that subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law.

Moreover, we are persuaded that a contrary rule would be undesirable as applied in the asbestos-related tort context. If mere exposure to asbestos were sufficient to

give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do. Requiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered. Therefore we hold that, as a matter of federal law, F.E.L.A. actions for asbestos-related injury do not exist before manifestation of injury.

Still, it has been held that, under certain circumstances, a person may hold a "contingent" claim and thereby be a "creditor" within the meaning of the bankruptcy act, even though he presently has no cause of action against the debtor. *See In re Radio-Keith-Orpheum Corporation*, 106 F.2d 22, 26-27 (2d Cir. 1939) (applying §77B of the Bankruptcy Act, formerly codified at 11 U.S.C. §207 (repealed in 1978)). This proposition follows from the broad language of section 77(b) which provides that "claims" include "interests of whatever character."

In *Radio-Keith-Orpheum*, landlords had leased property to one of the debtor's subsidiaries on guaranties by the debtor that the rent would be paid. The landlords argued that, because there had been no default under the leases, the guaranties should be unaffected by the bankruptcy proceedings. The Second Circuit rejected this argument. Applying a definition of "creditor" that, for present purposes, is virtually identical to the one found in section 77, the court treated the landlords as creditors. It held that they "were not as a matter of law entitled to stand aloof and obtain a continuance of the guaranties unaffected by the reorganization, the equivalent of a preference for them over unsecured creditors with accrued or determinable claims. What they were

entitled to was treatment as nearly like that accorded to ordinary unsecured creditors as the circumstances permitted. . . ." *Id.*

The reasoning in *Radio-Keith-Orpheum* is not controlling here, however, because we do not believe plaintiffs had "interests" of any character before injury manifested itself. In our view, before one can have an "interest" which is cognizable as a contingent claim under section 77, one must have a legal relationship relevant to the purported interest from which that interest may flow. *Cf. Avellino & Bienes v. M. Frenville Co., Inc. (In re* M. Frenville Co., Inc.), 744 F.2d 332 (3d Cir. 1984) (no contingent claim pursuant to 11 U.S.C. §101(4) (1982) unless a "right to payment" or a "right to an equitable remedy" exists).

In *Radio-Keith-Orpheum*, although there had been no breach of the lease agreement and thus there was no present cause of action pursuant to the guaranties, there was a guarantor-guarantee legal relationship from which an interest in the guaranty could flow. There is no legal relationship, however, between a tortfeasor and a tort victim until a tort actually has occurred. The tortfeasor-victim legal relationship arises simultaneously with the cause of action in tort. Since we have said that there is no tort under F.E.L.A. until injury manifests itself, it follows that there was no legal relationship between plaintiffs and defendants relevant to plaintiff's future causes of action in tort from which an "interest" could flow.

A number of factors lend support to this analysis. First, defendants have not cited a single opinion, other than those of the district courts in these cases, holding that a tort cause of action as yet nonexistent under applicable tort law is a contingent claim within the meaning of any section of the Bankruptcy Act or Bankruptcy Code. Second, the fairness rationale in *Radio-Keith-Orpheum* is inapplicable in the tort context. One who con-

tracts with a debtor prior to reorganization bargains for a legal relationship with that debtor, relying on the debtor's pre-reorganization solvency. We agree that such a person should not be "entitled to stand aloof" and avoid the consequences of the bankruptcy proceedings. *Id.* In contrast, a tort plaintiff cannot in any reasonable way be said to have bargained for his cause of action.

Third, a construction of "interest" that would include the future possibility of a tort cause of action against a debtor with whom the future victim has no legal relationship relevant to the purported "interest" would lead to results that we cannot believe were intended by Congress. Reading's treatment in its brief of *Mooney Aircraft Corp. v. Foster (In re* Mooney Aircraft, Inc.), 730 F.2d 367, 375 (5th Cir. 1984) illustrates this point.

The *Mooney* court, interpreting Chapter VII of the Bankruptcy Act of 1898, formerly codified at 11 U.S.C. §101 *et seq.* (repealed 1978), held that persons killed in an airplane crash five years after the close of the airplane manufacturer's bankruptcy proceedings did not have dischargeable "claims" against the debtor in the prior proceedings. Reading argues in its brief that the broad definition of "claims" in section 77, including "interests of whatever character," would mandate a contrary result under the *Mooney* facts. Thus, in Reading's view, a person who had no inkling that years in the future he would be killed by a product produced by the debtor would be required to file a claim in the debtor's section 77 bankruptcy proceedings so as to preserve any rights that he might have in a future tort suit. One court has already described such a procedure as "absurd." *Gladding Corp. v. Forbes (In re* Gladding Corp.), 20 Bankr. 566, 568 (D. Mass. 1982). We agree. It would be nearly as absurd under our facts to have expected plaintiffs, who allegedly had manifested no injury at the time of the reorganization proceedings, to file claims for such injury in those proceedings.

Finally, an interpretation of "interests" that included plaintiffs' future tort actions would raise constitutional questions. For example, the general rule is that all known creditors must receive personal notice. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-20 (1950). This requirement has proven to be manageable where creditors have a present legal relationship with the debtor, such as in the *Radio-Keith-Orpheum* case. But if contingent claims were held to include possible future tort claims, then every hypothetical chain of future events leading to liability, regardless of how likely or unlikely, might be the basis for a contingent claim. The holder of any such "claim" whose whereabouts were known would then seem to be a "known creditor." Thus, in our case, every employee who had worked near asbestos and whose address was known would be a known creditor; yet none received personal notice in the prior reorganization proceedings. We believe that our interpretation, which avoids such thorny Constitutional issues, is the proper view of Congressional intent.

We conclude, therefore, the plaintiffs' future F.E.L.A. causes of action were not dischargeable claims under section 77, and that the district courts erred in determining otherwise.[1] Our disposition of this issue makes it unnecessary for us to reach plaintiffs' alternative arguments.

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[1] Thus, we reject the argument made by Reading and CJI that the plaintiffs had claims that were discharged by the express terms of their respective plans. Because this case does not present the question of what provision in a reorganization plan, if any, could be made for future claims such as these (*e.g.*, reserve or sinking funds, insurance, annuities, etc.) we do not address that issue here.

IV.

CJI and Reading have presented additional contentions to this court. CJI contends that the plaintiffs in the state court action and intervenor Conrail in that action are collaterally estopped from arguing that their rights against it were not discharged. Reading contends that plaintiffs' causes of action cannot be asserted against the reorganized Reading Company because plaintiffs' alleged injuries were caused by a wholly different entity: the former Reading Company. The legal basis for Reading's argument is not clear. On the one hand, Reading appears to argue that, as a matter of bankruptcy law, a section 77 reorganization proceeding necessarily results in an entity that is wholly distinct from the debtor. On the other hand, Reading's argument may be that, pursuant to the corporate law under which Reading is organized, it cannot be held liable for plaintiff's claims because it is neither the same entity as the former Reading Company nor a successor corporation.

We do not address these arguments on the merits because they have not yet been considered by the district courts. Nor for the same reason do we consider any possible recovery against Mr. Timpany, as Trustee. The defendants will be afforded an opportunity to make their arguments before those courts on remand.

The judgments of the district courts will be reversed and the cases remanded for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STANLEY SCHWEITZER	:	
v.	:	CIVIL ACTION No. 81-5375
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
MILDRED SEIBERT, Individually and as Executrix of the estate of PAUL D. SEIBERT, Deceased	:	
v.	:	CIVIL ACTION No. 81-5376
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
GEORGE A. WENTZEL	:	
v.	:	CIVIL ACTION No. 82-1683
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
CARL SCHOLING	:	
v.	:	CIVIL ACTION No. 82-1684
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
MARTIN H. SCHOLL, Individually and as Executor of the estate of ETHEL M. SCHOLL, Deceased	:	
v.	:	CIVIL ACTION No. 82-1685
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

WOODROW W. SCHWAMBACK	:	
v.	:	CIVIL ACTION No. 82-2467
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
MARILYN L. FRANK, Executrix of the estate of RUSSELL C. WENNELL, Deceased	:	
v.	:	CIVIL ACTION No. 82-2999
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
EARL R. FENSTERMACHER	:	
v.	:	CIVIL ACTION No. 82-4923
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

OPINION

DITTER, J. January 10, 1984

On November 23, 1971, the Reading Company filed for reorganization under section 77 of the former Bankruptcy Act, 11 U.S.C. §205. In the ensuing nine years, considerable efforts were made by the court, the debtor's trustees, and other inter-ested parties in an attempt to develop a plan of reorganization that was equitable to the debtor's creditors and stockholders. This objective was ultimately reached, and on December 23, 1980, I entered Order No. 2004 which consummated the plan of reorgani-zation. Included within this consummation order was the following provision relating to the discharge and release of claims:

> Section 3.03: Subject to the provisions of Section 6.02 below relating to the payment, assumption or satisfaction by the Reorganized Company of certain claims, the Debtor and the Reading Trustees shall, as

of the Consummation Date, be discharged and released forever from:

> (a) all obligations, debts, liabilities and claims against the Debtor, whether or not filed or presented, whether or not approved, acknowledged or allowed in these proceedings, and whether or not provable in bankruptcy, including without limitation taxes in respect of non-bankrupt leased lines and other subsidiaries which are being satisfied pursuant to the Plan and all claims assumed or guaranteed by the Debtor or enforceable against the property of the Debtor; . . .[1]

Subsequent to the consummation date, December 31, 1980, several former employees of Reading brought actions against it and Consolidated Rail Corporation pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §1 *et seq.*, seeking to recover for asbestos-related injuries resulting from their employment with the defendants. Presently before me are the motions to dismiss of the Reading Company on the ground that section 3.03 of the consummation order bars plaintiffs' rights to maintain their actions, even though the injuries for which compensation is sought did not become manifest until after the reorganization proceedings had been completed.[2] While the resolution of this question is difficult, the motions to dismiss must be granted.

The purpose of efforts under section 77 of the former Bankruptcy Act, 11 U.S.C. §205, is the reorganization

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[1] Section 6.02, entitled "Assumed Obligations" does not pertain to the type of claims that are asserted here. Instead, this section refers to claims "timely filed" against the debtor which the reorganized company is responsible for. Those claims that are not timely-filed are discharged by operation of Section 3.03.

[2] In section 7.03 of the consummation order, I reserved jurisdiction, *inter alia*, to consider any proof of claim against the debtor. Because of this reservation of jurisdiction, these actions have been temporarily assigned to me in order to resolve the motions to dismiss.

of the debtor railroad "by a readjustment of its financial structure in the interest of the debtor and its creditors and security holders." *Van Schaick v. McCarthy*, 116 F. 2d 987, 992 (10th Cir. 1941). In this regard, one of the goals of the proceedings is the development of a plan of reorganization that is fair and equitable and affords due recognition to the rights of each class of creditors and stockholders. 11 U.S.C. §205(e)(1). In order to achieve a fair and equitable result, the rights of the creditors and stockholders must be altered or modified in such a way that best serves all interested parties. *Id.* at section 205(b); 5 *Collier on Bankruptcy* (14th ed. 1978) §77.13[1]. As in the present case, this often means that creditors will be forced to accept less than 100 per cent of the amount owed to them by the debtor and the stockholders must accept stock in a company whose assets have been diminished by payments made to creditors. Obviously, this effort requires a delicate balancing of the competing interests and a willingness on the part of interested parties to make certain accommodations in order to achieve the desired goal.

Once a plan of reorganization has been developed by the debtor's trustees, it is submitted to the court for its approval. In order for the plan to be approved, the court must be satisfied that it complies with all requirements of law, is feasible, and is fair and equitable. 11 U.S.C. §205(e). I approved the Reading reorganization plan and made the appropriate findings on May 21, 1980. *In re Reading Company*, 24 Bankr. 858 (E.D. Pa. 1980). After the approved plan had been accepted by the appropriate number of creditors and shareholders, I issued an opinion and Order No. 1855 on September 25, 1980, confirming the plan. *See* 11 U.S.C. §205(e). The final step necessary to complete the reorganization was taken on December 23, 1980, when I issued Order No. 2004 which provided for the consummation of the plan on December 31, 1980.

The essence of this consummation order was the dissolution of the debtor company and creation of the reorganized company. Section 2.02 of Order No. 2004 states that "the Reading Trustees shall cause the books and accounts of the Debtor to be closed as of 11:59 P.M., E.S.T., on the Consummation Date. The books and accounts of the Reorganized Company shall be opened as of 12:00 A.M., E.S.T., on the day following the Consummation Date." The corporation that emerged from the reorganization pro-ceedings resembles the old Reading Company in name only. The debtor had already conveyed most of its rail assets to Conrail on April 1, 1976, pursuant to the Regional Rail Reorganization Act of 1973, 45 U.S.C. §701-94 (Supp. III 1973). The reorganized company that exists today operates as a real estate investment company whose railroad activities are limited to its ownership of certain properties, notably Reading terminal in downtown Philadelphia.

As previously noted, section 3.03 of the consummation order discharges the debtor as of December 31, 1980, from all obligations, debts, liabilities, and claims, whether or not filed or presented. The purpose of this provision is clear: to provide finality to the reorganization proceedings with regard to the claims asserted against the debtor. The court of appeals for the Sixth Circuit aptly summarized the purpose of a substantially similar provision in another section 77 proceeding.

> The provisions for reorganization could not be realized if the discharge of debtors were not complete and absolute . . . courts should relax the provisions of the law and facilitate the assertion of old claims against discharged and reorganized debtors, the policy of the law would be defeated. . . . [C]reditors would not participate in reorganizations if they could not feel that the plan was final . . . [I]t would be unjust and unfair to those who had accepted and acted upon a reorganization plan if the court were thereafter to reopen the

> plan and change the conditions which constituted the basis of its earlier acceptance.

Duryee v. Erie Railroad Company, 175 F. 2d 58, 63 (6th Cir.), *cert. denied*, 338 U.S. 861 (1949). I am in complete accord with this reasoning. Recently, Chief Judge Clarkson S. Fisher of the District of New Jersey echoed a similar rationale in holding that two railroad employees were barred from asserting claims against Central Railroad Company of New Jersey and its reorganized company, Central Jersey Industries, for injuries that had not been discovered at the time of consummation. *In re Central Railroad Company of New Jersey*, No. B 67-401 (D. N.J. July 18, 1983). "Allowance of the claims asserted here and those that would likely follow in the future, would have a substantial impact upon the reorganized company. Furthermore, to permit the estate to be reopened each time a new claim is discovered would preclude any finality to the reorganization proceedings." *Id.* at 7. While it may be harsh to those claimants whose injuries did not become manifest until after the debtor's estate was closed, their claims cannot be heard. This result is inescapable due to the need to be consistent with the expectations of the creditors and stockholders who participated in the reorganization.

I have reached this conclusion with full recognition of the significant factual underpinning of these claims. Evidence has been presented which indicates that officials of the old Reading were aware of the existence of asbestos-related claims prior to the consummation order of December 23, 1980. In a letter of June 5, 1980, to its accountant describing the possible liabilities and future debts of the debtor, Reading's legal counsel stated in part:

> Asbestos fibers were used for some time in the construction and repair of steam boilers by debtor. One suit has been filed for damages resulting from exposure to these fibers and news media publicity has indicated

> that additional claims may be made. Similarly, claims are possible from employees of Debtor who has been exposed to a toxic substance used in insulating material for electric motors which is alleged to be a cause of cancer. No estimate can be made at this time of the extent of possible liability from these two causes.

(Exhibit B of Plaintiffs' Second Memorandum in Opposition to Defendant's Motion to Dismiss.) In addition, on November 6, 1980, the administrative counsel of Reading accompanied officials of the National Institute of Occupational Safety and Health (NIOSH) on a tour of the Reading facilities where the plaintiffs were generally employed. This tour was part of NIOSH investigation of asbestos-related complaints which had been received concerning this job site. Plaintiffs contend that Reading should be held accountable for these claims since its officials knew of their injuries or the possibility of their injuries coming into existence prior to the date of the consummation order. Because of this knowledge, plaintiffs argue that Reading should be estopped from disclaiming liability for asbestos-related injuries.

I disagree. As previously explained, the reorganized company resembles the now-defunct debtor in name only. For all practical purposes, the debtor is a dissolved corporation and the present Reading Company is a separate and distinct entity. As of 11:59 P.M. on December 31, 1980, the debtor ceased to exist. From this time forward, the debtor and the reorganized company were discharged from all past, present, or future claims. Under these circumstances, the reorganized company cannot be responsible for the liabilities of a debtor that is no longer in existence. *See* 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §7327 (perm. ed. 1983). To the extent plaintiffs allege fraud or misrepresentation by officials of the debtor which occurred prior to the reorganization, this alleged wrongful conduct cannot be imputed to the new Reading. *Frey v. Frankel*, 443 F. 2d 1240 (10th Cir. 1971).

For the foregoing reasons, the plaintiffs' claims against both the debtor and the reorganized company must be dismissed.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

STANLEY SCHWEITZER	:	
v.	:	CIVIL ACTION No. 81-5375
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
MILDRED SEIBERT, Individually and as Executrix of the Estate of PAUL D. SEIBERT, Deceased	:	
v.	:	CIVIL ACTION No. 81-5376
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
GEORGE A. WENTZEL	:	
v.	:	CIVIL ACTION No. 82-1683
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
CARL SCHOLING	:	
v.	:	CIVIL ACTION No. 82-1684
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
MARTIN H. SCHOLL, Individually and as Executor of the Estate of ETHEL M. SCHOLL, Deceased	:	
v.	:	CIVIL ACTION No. 82-1685
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
WOODROW W. SCHWAMBACK	:	
v.	:	CIVIL ACTION No. 82-2467
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

MARILYN L. FRANK, Executrix of the Estate of RUSSELL C. WENNELL, Deceased	:	
v.	:	CIVIL ACTION No. 82-2999
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
EARL R. FENSTERMACHER	:	
v.	:	CIVIL ACTION No. 82-4923
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

ORDER

AND NOW, this 10th day of January, 1984, for the reasons expressed in the foregoing opinion, the motions to dismiss of the Reading Company are hereby granted.

BY THE COURT

/s/ J. WILLIAM DITTER JR.
J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARL SCHOLING,	:	
	:	CIVIL ACTION
v.	:	No. 82-1684
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

ORDER

TROUTMAN, S.J.

AND NOW, this 29th day of March, 1984, upon consideration of the pending motions of plaintiff and defendant Consolidated Rail Corporation, and upon a finding that the above captioned case involves multiple parties, and having determined that the order of the Honorable J. William Ditter, Jr., entered January 11, 1984, granting the motions of The Reading Company to dismiss was a final decision as to the rights and liabilities of The Reading Company and that there is no just reason for delay, IT IS ORDERED that judgment is hereby entered in favor of defendant The Reading Company and against the plaintiff and defendant Consolidated Rail Corporation.

IT IS FURTHER ORDERED that this judgment is entered pursuant to F.R.C.P. 54(b).

/s/ E. MAC TROUTMAN

S.J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EARL R. FENSTERMACHER, Plaintiff,	:	
v.	:	CIVIL ACTION No. 82-4923
CONSOLIDATED RAIL CORPORATION	:	
v.	:	
ANCHOR PACKING COMPANY, et al., Defendants.	:	

ORDER

NOW, this thirteenth day of March, 1984, upon consideration of the January 10, 1984 Order of Judge J. William Ditter, Jr., granting the motion of The Reading Company to dismiss the complaint against it and Judge Ditter's opinion of the same date, and because I have determined that there is no just reason for delay of the entry of final judgment and that this judgment is ripe for review,

IT IS ORDERED that judgment is entered in favor of defendant The Reading Company and against the plaintiff pursuant to Rule 54(b) of the Federal Rules of Civil Procedure;

IT IS FURTHER ORDERED that the proceedings in this matter shall be suspended pending final determination on appeal of the Order entered herein.

BY THE COURT:

/s/ EDWARD N. CAHN

Edward N. Cahn J.

IN THE UNITED STATES DISTRICT COURT
FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

MILDRED SEIBERT, et al.	:	
v.	:	CIVIL ACTION NO. 81-5376
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	
GEORGE A. WENTZEL	:	
v.	:	CIVIL ACTION NO. 82-1683
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

O R D E R

AND NOW, this 26th day of January, 1984, IT IS ORDERED that the order entered on January 10, 1984, by The Honorable J. William Ditter, Jr., dismissing The Reading Company as a defendant in the within actions shall be deemed to be a final order in accordance with Fed. R. Civ. Pro. 54(b).

BY THE COURT:

/s/ EDWARD N. CAHN

Edward N. Cahn J.

IN THE UNITED STATES DISTRICT COURT
FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

MILDRED SEIBERT, et al., Plaintiff,	:	
v.	:	CIVIL ACTION NO. 81-5376
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY, Defendants.	:	

ORDER

AND NOW, this thirteenth day of March, 1984, upon consideration of the January 10, 1984 Order of Judge J. William Ditter, Jr., granting the motion of The Reading Company to dismiss the complaint against it and Judge Ditter's opinion of the same date, and because I have determined that there is no just reason for delay of the entry of final judgment and that this judgment is ripe for review,

IT IS ORDERED that judgment is entered in favor of defendant The Reading Company and against the plaintiff pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

BY THE COURT:

/s/ EDWARD N. CAHN

Edward N. Cahn J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GEORGE A. WENTZEL, Plaintiff,	:	
v.	:	CIVIL ACTION NO. 82-1683
CONSOLIDATED RAIL CORPORATION	:	
and	:	
THE READING COMPANY, Defendants.	:	

ORDER

AND NOW, this thirteenth day of March, 1984, upon consideration of the January 10, 1984 Order of Judge J. William Ditter, Jr., granting the motion of The Reading Company to dismiss the complaint against it and Judge Ditter's opinion of the same date, and because I have determined that there is no just reason for delay of the entry of final judgment and that this judgment is ripe for review,

IT IS ORDERED that judgment is entered in favor of defendant The Reading Company and against the plaintiff and against the defendant Consolidated Rail Corporation on its cross claim against The Reading Company pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

BY THE COURT:

/s/ EDWARD N. CAHN

Edward N. Cahn J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN H. SCHOLL, Individually and as Executor of the Estate of ETHEL M. SCHOLL, Deceased	:	
v.	:	CIVIL ACTION NO. 82-1685
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

ORDER

NOW, February 9, 1984, upon consideration of the January 10, 1984 order of Judge J. William Ditter, Jr., granting the motion of The Reading Company to dismiss the complaint against it and Judge Ditter's opinion of the same date, and because I have determined that there is no just reason for delay of the entry of final judgment and that this judgment is ripe for review, IT IS ORDERED THAT JUDGMENT IS ENTERED IN FAVOR OF DEFENDANT THE READING COMPANY AND AGAINST THE PLAINTIFF AND AGAINST THE THIRD-PARTY PLAINTIFF CONSOLIDATED RAIL CORPORATION PURSUANT TO RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

/s/ DANIEL H. HUYETT, 3RD
Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARILYN L. FRANK, Executrix of the Estate of Russell C. Wennell, deceased	:	
v.	:	CIVIL ACTION NO. 82-2999
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

ORDER

TROUTMAN, S.J.

AND NOW, this 3rd day of February, 1984, upon consideration of the pending motions of plaintiff and defendant Consolidated Rail Corporation, and upon a finding that the above captioned case involves multiple parties; that the order of the Honorable J. William Ditter, Jr. entered January 11, 1984, granting the motions of The Reading Company to dismiss was a final decision as to the rights and liabilities of The Reading Company; that there is no just reason for delay, IT IS ORDERED that judgment is hereby entered in favor of defendant The Reading Company and against the plaintiff and defendant Consolidated Rail Corporation.

IT IS FURTHER ORDERED that this judgment is entered pursuant to F.R.C.P. 54(b).

/s/ E. MAC TROUTMAN

S.J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STANLEY SCHWEITZER	:	
v.	:	CIVIL ACTION NO. 81-5375
CONSOLIDATED RAIL CORPORATION and THE READING COMPANY	:	

ORDER

TROUTMAN, S.J.

AND NOW, this 3rd day of February, 1984, upon consideration of the pending motions of plaintiff and defendant Consolidated Rail Corporation, and upon a finding that the above captioned case involves multiple parties; that the order of the Honorable J. William Ditter, Jr., entered January 11, 1984, granting the motions of The Reading Company to dismiss was a final decision as to the rights and liabilities of The Reading Company; that there is no just reason for delay, IT IS ORDERED that judgment is hereby entered in favor of defendant The Reading Company and against the plaintiff and defendant Consolidated Rail Corporation.

IT IS FURTHER ORDERED that this Judgment is entered pursuant to F.R.C.P. 54(b).

/s/ E. MAC TROUTMAN
S.J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WOODROW W. SCHWAMBACH	:	
	:	CIVIL ACTION
v.	:	NO. 82-2467
CONRAIL	:	

ORDER

NOW, January 27, 1984, upon consideration of the January 10, 1984 order of Judge J. William Ditter, Jr., granting the motion of The Reading Company to dismiss the complaint against it and Judge Ditter's opinion of the same date, and because I have determined that there is no just reason for delay of the entry of final judgment and that this judgment is ripe for review, IT IS ORDERED THAT JUDGMENT SHALL BE ENTERED IN FAVOR OF DEFENDANT THE READING COMPANY AND AGAINST THE PLAINTIFF AND AGAINST THE THIRD-PARTY PLAINTIFF CONSOLIDATED RAIL CORPORATION PURSUANT TO RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE. MY ORDER OF JANUARY 18, 1984 IS VACATED.

/s/ DANIEL H. HUYETT, 3rd

Daniel H. Huyett, 3rd, Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ACTION NO. B 67-401

In the Matter of	:	
THE CENTRAL RAILROAD	:	OPINION
COMPANY OF NEW JERSEY	:	

FISHER, Chief Judge.

On March 22, 1967, the Central Railroad Company of New Jersey ("CNJ") filed for reorganization under §77 of the former Bankruptcy Act. Thereafter it operated under federal trusteeship until consummation of its plan of reorganization on September 14, 1979. On April 1, 1976, Consolidated Rail Corporation ("Conrail") acquired virtually all of the CNJ rail system pursuant to the Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. §701 *et seq.* Robert D. Timpany ("Timpany") served as trustee from early 1971 until consummation.

Order No. 965, "Order in Aid of Consummation of the Amended Plan of Reorganization of the Central Railroad Company of New Jersey," was filed on September 13, 1979. It discharged the debtor and the trustee from:

> all obligations, debts, liabilities and claims against the Debtor, whether or not filed or presented, whether or not approved, acknowledged or allowed in these proceedings and whether or not provable in bankruptcy, including without limitation all claims assumed or guaranteed by the Debtor or enforceable against the property of the Debtor . . .

except to the extent provided by the reorganization plan. It provided for the transfer to the reorganized company of all of the assets and property of the estate of the debtor:

> free and clear of all claims, rights, demands, interests, liens and encumbrances of every kind and char-

acter, whether or not properly or timely filed and whether or not approved, acknowledged or allowed in these proceedings, of the Debtor, its creditors, claimants and stockholders . . .

It also provided that:

All persons, firms, governmental entities and corporations, wherever situated, located or domiciled, are hereby *permanently* restrained and enjoined from instituting, prosecuting or pursuing, or attempting to institute, prosecute or pursue any suits or proceedings, except such suits or proceedings as may be for the purpose of carrying out this Order or Order 964 or consummating the Plan, at law or in equity or otherwise, against the Reorganized Company or its successors or assigns or against any of the assets or property of the Reorganized Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claim or interest of any kind or nature whatsoever which any person, firm, governmental entity or corporation may have in, to or against the Debtor, the Trustee of the property of the Debtor or any of his assets or properties, and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing, any portion of the property, real, personal, or mixed, of any kind or character, on or at any time after the Consummation Date in the possession of the Reorganized Company and from interfering with or taking steps to interfere with the Reorganized Company, its officers and agents, or the operation of the properties or the conduct of the business of the Reorganized Company, by reason of or on account of any obligation or obligations incurred by the Debtor or any of its Trustees in these pro-ceedings, except the obligations imposed on the Reorganized Company by the Plan and this Order. All persons, firms, govern-

> mental entities and corporations, wherever situated, located or domiciled, are hereby restrained and enjoined from instituting, prosecuting or pursuing or attempting to institute, prosecute or pursue any suit or proceedings, at law or in equity or otherwise, against the Debtor or any of its assets or property, directly or indirectly. (emphasis supplied).

The Court retained jurisdiction to consider and take appropriate action with respect to the foregoing provision and to take such action and enter such orders as might be necessary to carry out the plan of reorganization, the order in aid of consummation, and all other orders relative thereto. The estate was closed effective as of the consummation date.

On July 29, 1982, Frank Wooten ("Wooten") filed a complaint in the Superior Court of New Jersey, pursuant to the Federal Employer's Liability Act, against CNJ, Timpany, Conrail, and Central Jersey Industries Inc. ("CJI"), the reorganized company seeking recovery for alleged injuries and diseases contracted during his employment by CNJ and Timpany. On December 29, 1982, a similar action was commenced in the Superior Court of New Jersey by Raymond Mansfield ("Mansfield"), the Estate of Raymond Mansfield, and Mary Mansfield.[1] The plaintiffs in these cases have alleged that their claims did not arise until after the date of the consummation order because they did not discover their injuries until after that date.[2]

[1] This action also names as defendants several shipyards that had employed Mansfield and several manufacturers of cigarettes smoked by him.

[2] While the Mansfield complaint contains an allegation as to the date of discovery, the Wooten complaint does not. The only such allegation is in Wooten's brief. For purposes of the present action, I will assume the accuracy of his allegations.

CJI moved in state court to dismiss the Wooten complaint for lack of subject matter jurisdiction but its motion was denied. At the same time, Wooten moved before this Court to reopen Order No. 965 to permit him to proceed against CJI. That motion was later withdrawn. CJI now petitions this Court, on behalf of itself, CNJ, and Timpany, for an order (1) declaring that the claims against them by the state court plaintiffs arising out of the employment of Wooten and Mansfield by CNJ and Timpany are discharged; (2) permanently enjoining plaintiffs from prosecuting their state court actions with respect to CNJ, Timpany, and CJI; and (3) adjudging plaintiffs in contempt of Order No. 965 unless they dismiss their actions as to CNJ, Timpany, and CJI within ten (10) days.

The question raised by the instant matter is whether this Court's order discharging the debtor and the trustee and enjoining any suits against the reorganized company based upon claims against the debtor and the trustee, can act to bar claims for injuries that had not yet been discovered at the time of consummation. That question must be answered in the affirmative.

The authority for the Court's order is found in §77 of the former Bankruptcy Act dealing with the reorganization of railroads in interstate commerce. This statute provides, *inter alia*, that upon confirmation, a plan of reorganization shall be binding upon all creditors whether or not their claims shall have been filed; that the property dealt with by the plan be transferred free and clear of all claims of creditors; that the debtor be discharged from its debts and liabilities; and that upon termination of the proceedings a final decree shall be entered discharging the trustee, making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Former 11 U.S.C. §205(f). The term "creditors" includes "all holders of claims of whatever character against the debtor or its property whether or not such claims would

otherwise constitute provable claims under [the former Bankruptcy] Act. . . ." Former 11 U.S.C. §205(b). The term "claims" is defined very broadly and includes "debts, whether liquidated or unliquidated, securities. . ., liens, or other interests of whatever character," *Id.*, and "all claims of whatever character against the debtor ... whether ... fixed or contingent," former Bankruptcy Rule 8-701(g).

Section 77 "reflects a public policy that the operation of railroads as sound economic units should be achieved for the benefit of the public regardless of the interest of creditors and stockholders.... To this end, any reorganization plan ... should be drastic enough to assure the continued solvency of the enterprise...." 5 Collier on Bankruptcy (14th Ed.) § 77.02[1]. The broad scope of the statute's definitions facilitates this policy and must be held to encompass the claims presented by these state court plaintiffs.

The main purpose of §77 is the rehabilitation of the debtor railroad rather than the liquidation of its assets. *Connecticut Ry. and Lighting Co. v. Palmer*, 305 U.S. 493, 501 (1939); *Van Schaick v. McCarthy*, 116 F.2d 987, 992-93 (10th Cir. 1941); *In Re Penn Central Transportation Co.*, 458 F. Supp. 1234, 1246 (E.D. Pa. 1978). The real worth of a railroad, both monetarily and with respect to the public interest, lies in its value as a going concern. The value of its assets, if sold piecemeal, would be negligible. Congress regarded reorganization as the most feasible solution for a railroad that became insolvent or unable to meet its debts as they matured. *Van Schaick, supra* at 992; see also, *In Re Penn Central, supra* at 1246.

A plan of reorganization must design a capital structure such that the fixed charges are brought within the probable future earnings of the reorganized company. *Van Schaick, supra* at 992; *In Re Penn Central, supra* at 1247. In order for this to be accomplished, there must

be a determination, prior to consummation, of the assets and liabilities of the estate and of the obligations and burdens that the reorganized company will be expected to bear. In the present case, the capital structure of CJI was based upon certain assumptions as to what burdens it could reasonably bear. Interests in the company and certain of its assets were distributed accordingly. The original capitalization of CJI, the allocation of its securities, and the public trading in those securities have all reflected the outcome of the reorganization proceedings, including the termination of liabilities not taken into account prior to the closing of the estate. Allowance of the claims asserted here and those that would likely follow in the future, would have a substantial impact upon the reorganized company. Furthermore, to permit the estate to be reopened each time a new claim is discovered would preclude any finality to the reorganization proceeding.

The purpose of the reorganization provisions could not be realized if the discharge of the debtor were not complete and absolute. If third parties could not rely on the finality of the plan of reorganization, they would be reluctant to invest or deal with the reorganized company. *See Duryee v. Erie R. Co.*, 175 F.2d 58, 63 (6th Cir.), *cert. denied*, 338 U.S. 861 (1949).

For the above reasons, I hold that Order No. 965 discharged CNJ and Timpany from the claims presented by the Wooten and Mansfield plaintiffs. It also bars those plaintiffs from proceeding against CJI based upon claims against CNJ and Timpany.

It is well settled that a court of bankruptcy may enjoin prosecution of an action in state court in order to enforce or protect its decree. *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934); *Evans v. Dearborn Machinery Movers Co.*, 200 F.2d 125 (6th Cir. 1953); *Mar-Tex Realization Corp. v. Wolfson*, 145 F.2d 360 (2d Cir. 1944). I therefore grant CJI's petition for declaratory and injunctive relief. At-

torney for CJI shall submit an appropriate order within five (5) days.

/s/ CLARKSON S. FISHER

Clarkson S. Fisher, Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In the Matter of	:	In Proceedings for the Reorganization of a Railroad
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor.	:	Hon. Clarkson S. Fisher
	:	No. B 401-67 ORDER NO. 978

ORDER DETERMINING STATUS OF CLAIMS AND ENJOINING PROSECUTION THEREOF

Central Jersey Industries, Inc., the reorganized Central Railroad Company of New Jersey, having filed a Petition for declaratory and injunctive relief with respect to certain claims being asserted by former employees of the Central Railroad Company of New Jersey, and the matter having come on for a hearing on May 23, 1983, which was duly noticed, and the Court having considered the Petition, the briefs and argument of counsel in support and opposition thereto and all parties in interest having been heard or given the opportunity to be heard, and good cause appearing;

NOW, THEREFORE, it is on this 26th day of July, 1983

ORDERED that any and all claims of Frank M. Wooten (Wooten) against the Central Railroad Company of New Jersey (CNJ), R.D. Timpany (Timpany), former Trustee of the Central Railroad Company of New Jersey arising out of his employment by CNJ or Timpany and any and all claims of Wooten against Central Jersey Industries, Inc. (CJI) based upon any claim against CNJ or Timpany be and hereby are declared to be discharged and barred pursuant to the provisions of Order 965 of this Court; and be it

FURTHER ORDERED that Frank M. Wooten and any and all persons acting on his behalf be and hereby are restrained and enjoined from prosecuting the case of *Wooten v. The Central Railroad Company of New Jersey, et al.*, Docket Number L67140-81 in the Superior Court of New Jersey, Essex County, Law Division with respect to defendants CNJ, Timpany and CJI to the extent such action against CJI is based upon claims against CNJ or Timpany; and be it

FURTHER ORDERED that Frank M. Wooten is directed to dismiss such action as to CNJ, Timpany and any claims therein against CJI based upon claims against CNJ and Timpany; and be it

FURTHER ORDERED that any and all claims of Raymond Mansfield, the Estate of Raymond Mansfield and Mary Mansfield (the Mansfield plaintiffs) against Central Railroad Company of New Jersey, R.D. Timpany, former Trustee of the Central Railroad Company of New Jersey, arising out of the employment of Raymond Mansfield by CNJ or Timpany and any and all claims of the Mansfield plaintiffs against Central Jersey Industries, Inc. based upon any claim against CNJ or Timpany be and hereby are declared to be discharged and barred pursuant to the provisions of ORDER 965 of this Court; and it is

FURTHER ORDERED that Raymond Mansfield, the Estate of Raymond Mansfield and Mary Mansfield and any and all persons acting on their behalf be and hereby are restrained and enjoined from prosecuting the case of *Raymond Mansfield, et al. v. Central Railroad Company of New Jersey, et al.*, Docket Number L000493-83 in the Superior Court of New Jersey, Ocean County, Law Division with respect to defendants CNJ, Timpany and CJI to the extent such action against CJI is based upon a claim against CNJ or Timpany; and be it

FURTHER ORDERED that the Mansfield plaintiffs are directed to dismiss said action as to CNJ, Timpany and any claims therein against CJI based upon claims against CNJ and Timpany.

/s/ CLARKSON S. FISHER

Clarkson S. Fisher
C.J.U.S.D.C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In the Matter of	:	In Proceedings for the Reorganization of a Railroad
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor.	:	Hon. Clarkson S. Fisher
	:	No. B 67-401 ORDER NO. 981

ORDER DETERMINING STATUS OF CLAIMS AND ENJOINING PROSECUTION THEREOF

Central Jersey Industries, Inc., the reorganized Central Railroad Company of New Jersey, having filed a Petition for declaratory and injunctive relief with respect to certain claims being asserted by a former employee of the Central Railroad Company of New Jersey, and Consolidated Rail Corporation having filed a motion to intervene and the matter having come on for a hearing on April 9, 1984, which was duly noticed, and the Court having considered the Petition, the motion, the briefs, the certification and arguments of counsel in support and opposition hereto and all parties in interest having been heard or given the opportunity to be heard, and good cause appearing;

NOW, THEREFORE, it is on this 16th day of April, 1984;

ORDERED, that any and all claims of Andrew Thomas and Trudell Thomas, his wife against the Central Railroad Company of New Jersey (CNJ), R.D. Timpany (Timpany), former Trustee of the Central Railroad Company of New Jersey, arising out of his employment by CNJ or Timpany and any and all claims of the Thomas plaintiffs against Central Jersey Industries, Inc. (CJI) based upon any claim against CNJ or Timpany be and

hereby are declared to be discharged and barred pursuant to the provisions of Order 965 of this Court; and be it

FURTHER ORDERED that Andrew Thomas and Trudell Thomas, his wife, and any and all persons acting on their behalf be and hereby are restrained and enjoined from prosecuting the case of *Thomas v. Central Railroad of New Jersey, et al.*, Docket No. L-038433-83 in the Superior Court of New Jersey, Essex County, Law Division with respect to defendants CNJ, Timpany and CJI to the extent such action against CJI is based upon claims against CNJ or Timpany; and be it

FURTHER ORDERED that unless Andrew Thomas and Trudell Thomas, his wife, and George M. Kachmar III dismiss such action as to CNJ, Timpany and any claims therein against CJI based upon claims against CNJ and Timpany within 10 days of the date of this Order said persons shall be adjudged to be in contempt of Order 965 of this Court; and be it

FURTHER ORDERED that the motion of Consolidated Rail Corporation to intervene in the within matter be and hereby is granted.

/s/ CLARKSON S. FISHER

Clarkson S. Fisher
C.J.U.S.D.C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In the Matter of	:	In Proceedings for the Reorganization of a Railroad
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor.	:	Hon. Clarkson S. Fisher
	:	No. B 67-401 ORDER NO.

ORDER DETERMINING STATUS OF CLAIMS AND ENJOINING PROSECUTION THEREOF

Central Jersey Industries, Inc., the reorganized Central Railroad Company of New Jersey, having filed a Petition for declaratory and injunctive relief with respect to certain claims being asserted by former employees of the Central Railroad Company of New Jersey, and the matter having come on for a hearing on May 29, 1984, which was duly noticed, and the Court having considered the Petition, the motion, the briefs, the certification and arguments of counsel in support and opposition thereto and all parties in interest having been heard or given the opportunity to be heard, and good cause appearing;

NOW, THEREFORE, it is on this 18th day of June, 1984;

ORDERED that any and all claims of Joseph Pongrac, Sr., Robert A. Bingle, Alexander Redelico and Evelyn Redelico, his wife, Joseph C. Popadick and Elna Popadick, his wife, and Edward Witos and Philomena Witos, his wife, against the Central Railroad Company of New Jersey (CNJ), R.D. Timpany (Timpany), former Trustee of the Central Railroad Company of New Jersey, arising out of their employment by CNJ or Timpany and any and all claims of the *Pongrac, Bingle, Redelico, Popad-*

ick, and *Witos* plaintiffs against Central Jersey Industries, Inc. (CJI) based upon any claim against CNJ or Timpany be and hereby are declared to be discharged and barred pursuant to the provisions of Order 965 of this Court; and be it

FURTHER ORDERED that Mark Gammel, Harry Guralchuk, Steve Palichak, Joseph M. Pinto, Frank Pongrac, Jr., John Sowizral, Harry Wilson, George J. Zeblisky and any and all persons acting on their behalf be and hereby are permanently restrained and enjoined from commencing any action against CNJ or Timpany based upon any claim arising out of their employment by CNJ or Timpany or against CJI based upon any claim against CNJ or Timpany; and be it

FURTHER ORDERED that Francis Pongrac, Sr., Robert A. Bingle, Alexander Redelico and Evelyn J. Redelico, his wife, Joseph C. Popadick and Elna Popadick, his wife, and Edward Witos and Philomena Witos, his wife, and any and all persons acting on their behalf be and hereby are restrained and enjoined from prosecuting the actions of *Pongrac v. Central Railroad Company of New Jersey, et al.*, Civil Action No. 84-1404, *Bingle v. Central Railroad Company of New Jersey, et al.*, Civil Action No. 84-1399, *Redelico v. Central Railroad Company of New Jersey, et al.*, Civil Action No. 84-1402, *Popadick v. Central Jersey Industries, Inc., et al.*, Civil Action No. 84-1761, and *Witos v. Central Jersey Industries, Inc., et al.*, Civil Action No. 84-1762 in the United States District Court for the Eastern District of Pennsylvania with respect to defendants CNJ, Timpany and CJI to the extent such action against CJI is based upon claims against CNJ or Timpany; and be it

FURTHER ORDERED, that unless Joseph Pongrac, Sr., Robert A. Bingle, Alexander Redelico and Evelyn J. Redelico, his wife, Joseph C. Popadick and Elna Popadick, his wife, Edward Witos and Philomena Witos, his wife, Robert J.F. Brobyn, Esq. and Richard H. Mid-

dleton, Jr., Esq. dismiss such action as to CNJ, Timpany and any claims therein against CJI based upon claims against CNJ and Timpany within 10 days of the date of this Order said persons shall be adjudged to be in contempt of Order 965 of this Court.

/s/ CLARKSON S. FISHER

Clarkson S. Fisher
C.J.U.S.D.C.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1086

SCHWEITZER, JOSEPHINE,
Appellant,

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
and
THE READING COMPANY

(Civil No. 81-5375, E. D. of Pa.)

No. 84-1087

SEIBERT, MILDRED, Individually and as Executrix of the Estate of Seibert, Paul D., Deceased,
Appellant,

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
THE READING COMPANY

(Civil No. 81-5376, E. D. of Pa.)

No. 84-1088

WENTZEL, GEORGE A.,
Appellant

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
and
THE READING COMPANY

(Civil No. 82-1683, E. D. of Pa.)

No. 84-1089

ELAINE SCHWAMBACH, Executrix of the Estate of Woodrow W. Schwambach and MERLIN SCHWAMBACH, Executor of that Estate,

Appellants

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
and
THE READING COMPANY

(Civil No. 82-2467, E. D. of Pa.)

No. 84-1108

FRANK, MARILYN L., as Executrix of the Estate of Russell C. Wennell, deceased,

Appellant

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
and
THE READING COMPANY

(Civil Action No. 82-2999, E. D. of Pa.)

No. 84-1132

SCHOLL, MARTIN H., Individually and as Executor of the Estate of Ethel M. Scholl, deceased,

Appellant

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL)
and
THE READING COMPANY

(Civil Action No. 84-1685, E. D. of Pa.)

Nos. 84-1203 and 84-1204

FENSTERMACHER, EARL R., and SCHOLING, CARL,

v.

CONSOLIDATED RAIL CORPORATION, a corporation, and THE READING COMPANY, a corporation

v.

ANCHOR PACKING COMPANY, CELOTEX CORPORATION, successor-in-interest to Philip Carey Manufacturing Company, Philip Carey Corporation, Briggs Manufacturing Company and/or Panacon Corporation, CERTAINTEED CORPORATION, DUROX EQUIPMENT COMPANY, GARLOCK, INC., JANOS INDUSTRIAL INSULATION CORPORATION, JOHN CRANE-HOUDAILLE, INC., J. W. ROBERTS LTD., KEENE CORPORATION, NICOLET, INC., NOSROC CORPORATION, successor-in-interest to G. & W. H. Corson, Inc. and Calcite Quarry Corporation, STUDEBAKER-WORTHINGTON, INC., TANNETICS, INC., TURNER & NEWALL PLC, TURNER ASBESTOS FIBERS LTD., UNION RUBBER, INC. and VELLUMOID COMPANY

Third Party Defendants

EAGLE PICHER INDUSTRIES, INC. and FLINTKOTE COMPANY

FENSTERMACHER, EARL R.
Appellant in No. 84-1203
(D. C. Civil No. 82-4923)

SCHOLING, CARL,
Appellant in No. 84-1204
(D. C. Civil No. 82-1684)

(Civil Nos. 82-4923 and 82-1684, E. D. of Pa.)

Nos. 84-1116, 84-1117, 84-1118, 84-1119, 84-1120, 84-1121

JOSEPHINE SCHWEITZER,

MILDRED SEIBERT, Individually and as Executrix of the Estate of Paul D. Seibert, Deceased

GEORGE A. WENTZEL

ELAINE SCHWAMBACH, Executrix of the Estate of Woodrow W. Schwambach and MERLIN SCHWAMBACH, Executor of that Estate

MARILYN L. FRANK, as Executrix of the Estate of Russell C. Wennell, Deceased

MARTIN H. SCHOLL, Individually and as Executor of the Estate of Ethel M. Scholl, Deceased

v.

CONSOLIDATED RAIL CORPORATION (CONRAIL) and THE READING COMPANY
CONSOLIDATED RAIL CORPORATION, Appellant

(Civil Nos. 81-5375, 81-5376, 82-1683, 82-2467, 82-2999, 82-1685) E. D. of Pa.

Nos. 84-1160 and 84-1194

EARL R. FENSTERMACHER and CARL SCHOLING

v.

CONSOLIDATED RAIL CORPORATION, a corporation, and THE READING COMPANY, a corporation

v.

ANCHOR PACKING COMPANY, CELOTEX CORPORATION, successor-in-interest to Philip Carey Manufacturing Company, Philip Carey Corporation, Briggs Manufacturing Company and/or Panacon Corporation,

CERTAINTEED CORPORATION, DUROX EQUIPMENT COMPANY, GARLOCK, INC., JANOS INDUSTRIAL INSULATION CORPORATION, JOHN CRANE-HOUDAILLE, INC., J.W. ROBERTS LTD., KEENE CORPORATION, NICOLET, INC., NOSROC CORPORATION, successor-in-interest to G. & W. H. Corson, Inc., and Calcite Quarry Corporation, STUDEBAKER-WORTHINGTON, INC., TANNETICS, INC., TURNER & NEWALL PLC, TURNER ASBESTOS FIBERS LTD., UNION RUBBER, INC. and VELLUMOID COMPANY,
Third-Party Defendants

EAGLE PICHER INDUSTRIES, INC.
and FLINTKOTE COMPANY

CONSOLIDATED RAIL CORPORATION, Appellant

(Civil Nos. 82-4923 and 82-1684 – E.D. Pa.)

On Appeals from the United States District Court for the Eastern District of Pennsylvania

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Nos. 84-5293 & 84-5310

In the Matter of:

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Debtor

CONSOLIDATED RAIL CORPORATION,
Intervenor

ANDREW THOMAS and TRUDELL THOMAS, his wife,
Appellants

ANDREW THOMAS and TRUDELL THOMAS, Appellants in No. 84-5293

INTERVENOR CONSOLIDATED RAIL CORPORATION,
Appellant in No. 84-5310

(B-67-401-Dist. of N.J. – Newark)

On Appeal from the United States District Court for the District of New Jersey — Newark

No. 84-5451

In the Matter of:

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Debtor

CONSOLIDATED RAIL CORPORATION,
Intervenor

Joseph Pongrac, Sr., Robert A. Bingle, Alexander Redelico and Evelyn Redelico, h/w, Joseph C. Popadick and Elma Popadick, h/w, Edward Witos and Philomena Witos, h/w, Mark Gammel, Harry Guralchuk, Steve Palichak, Joseph M. Pinto, Frank Pongrac, Jr., John Sowizral, Harry Wilson, George J. Zeblisky, Robert J.F. Brobyn, Richard Middleton and any and all persons acting on their behalf,
Appellants

(B-67-401-Dist. of N. J. – Newark)

On Appeal from the United States District Court for the District of New Jersey – Newark

Present: SEITZ, GARTH and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT

These causes came to be heard on the records from the United States District Courts for the Eastern District of Pennsylvania and the District of New Jersey and were argued by counsel December 13, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Courts entered in:

Eastern District of Pennsylvania Docket No. 81-5375 on January 25, 1984 and

February 8, 1984 and appealed at Docket Nos. 84-1086 and 84-1116;

Eastern District of Pennsylvania Docket No. 82-5376 on January 27, 1984 and appealed at Docket Nos. 84-1087 and 84-1117;

Eastern District of Pennsylvania Docket No. 82-1683 on January 27, 1984 and appealed at Docket Nos. 84-1088 and 84-1118;

Eastern District of Pennsylvania Docket No. 82-2467 on January 30, 1984 and appealed at Docket Nos. 84-1089 and 84-1119;

Eastern District of Pennsylvania Docket No. 82-2999 on February 8, 1984 and appealed at Docket Nos. 84-1108 and 84-1120;

Eastern District of Pennsylvania Docket No. 82-1685 on February 9, 1984 and appealed at Docket Nos. 84-1121 and 84-1132;

Eastern District of Pennsylvania Docket No. 82-4923 on March 15, 1984 and appealed at Nos. 84-1160 and 84-1203;

Eastern District of Pennsylvania Docket No. 84-1684 on March 30, 1984 and appealed at Nos. 84-1194 and 84-1204;

District of New Jersey Docket No. B-67-401 on April 16, 1984 and June 19, 1984 and appealed at Nos. 84-5293, 84-5310 and 84-5451, be, and the same are hereby reversed and the causes remanded to the said District Courts for further proceedings consistent with the opinion of this Court. Costs taxed against the appellees.

March 29, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 84-5293, 84-5310 and 84-5451

In the Matter of: THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, ROBERT D. TIMPANY, TRUSTEE, AND CENTRAL JERSEY INDUSTRIES, INC.
Appellees

ANDREW THOMAS AND TRUDELL THOMAS,
Appellants in No. 84-5293

CONSOLIDATED RAIL CORPORATION,
Intervenor-Appellant in No. 84-5310

FRANK PONGRAC, SR., et al.,
Appellants in No. 84-5451

(B-67-401-Dist. of N. J. – Newark)

On Appeal from the United States District Court for the District of New Jersey

SUR PETITION FOR REHEARING

Present: ALIDSERT, *Chief Judge*, and SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*.

The petition for rehearing filed by appellees in the above entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT

/s/ COLLINS J. SEITZ

Dated: April 26, 1985 Circuit Judge

APPENDIX E

DOCUMENT NO. 3638

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In the Matter of	:	In Proceedings for
	:	the Reorganization
ERIE LACKAWANNA	:	of a Railroad
RAILWAY CO.	:	
Debtor	:	No. B72-2838

ORDER NO. 1281

As prologue to addressing the issues of moment before the court a brief historical summary of this proceeding is in order.

Section 77 of the Bankruptcy Act (formerly 11 U.S.C. §205)[1] was supplemented in 1973 by the Regional Rail Reorganization Act ("Rail Act") (as amended, 45 U.S.C. §701 *et seq.*) to confront and accommodate the existing crisis of the northeast railroads, including the Debtor.[2]

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[1] On June 4, 1972, Debtor filed for reorganization pursuant to Section 77 of the Bankruptcy Act which was directed exclusively to railroad reorganizations. The current Bankruptcy Code became effective October 1, 1979 and applies only to actions commenced thereafter. To the extent that any case interpreting the Code would articulate a different result than Section 77 with respect to the issues joined herein by the amended pleadings, it should be analyzed in light of the existing differences between the Act and the Code.

[2] For purposes of this opinion, the Erie Lackawanna Railway Company is referred to as, "the Debtor"; Erie Lackawanna, the reorganized company is referred to as "Erie"; Consolidated Rail Corporation is referred to as "Conrail", and the Final Plan of Reorganization is referred to as "the Plan".

The Rail Act was promulgated by Congress to facilitate the reorganization of these railroads into a single viable system to be operated by Conrail. Pursuant to the Rail Act on March 30, 1976, the Debtor ceased all rail operations and shortly thereafter the bulk of its rail properties were conveyed to Conrail, thus concluding the Debtor's tenure as an operating railroad. Subsequent to this conveyance, the Debtor's limited resources precluded its reorganization as an ongoing business entity, and its Plan evolved, pursuant to Section 77, as a "liquidating" plan consistent with §601(b)(4) of the Rail Act, which provided that the bankruptcy court "shall proceed to reorganize or liquidate such railroad in reorganization pursuant to Section 77 on such terms as the court deems just and reasonable, or pursuant to any other provisions of the Bankruptcy Act, if the court finds that such action would be in the best interests of such estate." 45 U.S.C. §791. Accordingly, the Debtor was not restructured as an ongoing operational railroad but emerged as a completely different and distinct entity in the form of a liquidating corporation. It is not inconceivable, and perhaps more probable, that the Debtor as reorganized may cease to exist in the not too distant future.

During the intervening ten-year period between June of 1972 and November of 1982, the parties under the aegis of the reorganization court and pursuant to the mandate of §77 proceeded to readjust the entire financial structure of the Debtor and materially modify and alter the rights of creditors and security holders so as to best serve all interested parties including the Debtor, its creditors and security holders by formulating a plan that was fair and equitable to all classes of creditors. Bankruptcy Act, formerly 11 U.S.C. §205(b); *Van Schaik v. McCarthy*, 116 F.2d 987, 992 (10th Cir. 1941). Arduous, exhaustive and comprehensive negotiations and compromises were rewarded by a court-approved plan of reorganization which was consummated by a final degree of

discharge on November 30, 1982 (Order No. 1235). The Consummation Order declared this court's exclusive jurisdiction over the Debtor and its property and "all claims . . . whether or not properly or timely filed and whether or not approved in these proceedings." *Id.* at 2. Section 3.01 of the Consummation Order, and Section 3.3 of the Plan, directed the transfer of the Debtor's properties to Erie, free and clear of all claims, subject to certain exceptions defined in the Plan. Section 3.04 of the Consummation Order provided, in pertinent part, that

> The Debtor and the Debtor's Trustees shall, as of the Consummation Date, be discharged and released forever from
>
> > (a) All obligations, debts, liabilities and claims against the Debtor, whether or not filed or presented, whether or not approved, acknowledged or allowed in these proceedings and whether or not provable in bankruptcy, including without limitation all claims assumed or guaranteed by the Debtor or enforceable against the property of the Debtor;

Paragraph 3 of the order permanently enjoined all persons and entities from prosecuting any action against Erie on account of any claim against the Debtor, except as permitted in the Plan. Paragraph 4(vi) of the Final Decree reserved to this court's jurisdiction the authority to enforce the injunctive provisions of the final decree.

La Scala v. Consolidated Rail Corporation, et al. (Docket No. 84-1395) and *Henning v. Consolidated Rail Corporation, et al.* (Docket No. 84-1396) were commended in the United States District Court for the Eastern District of Pennsylvania on March 22, 1984, approximately sixteen months after the final consummation date of the Debtor's Plan. It must be noted that during this intervening period and continuing thereafter, Erie stock has been actively traded on the open market. The complaints in both actions are virtually identical and named the same thirty companies as defendants. Apart

from the Debtor, Erie, Conrail and New Jersey Transit Rail Operation (N.J. Transit) (collectively the "Railroad Defendants") the remaining named defendants are asbestos manufacturers, suppliers and installers. La Scala-Henning seek damages against the Railroad Defendants pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51-60, the Federal Safety Appliance Acts, 45 U.S.C. §§ 1-16 and the Boiler Inspection Acts, 45 U.S.C. 22-34. In these negligence actions La Scala-Henning charge that their exposure to products containing asbestos during their railroad employment resulted in the development of serious respiratory disease. They also assert causes of action against the remaining defendants predicated on theories of negligence, strict product liability, breach of warranty, conspiracy, fraudulent concealment and misrepresentation.

On October 26, 1983, the State of New York initiated an action in the New York State Supreme Court, Albany County, against Conrail, alleging that it was strictly liable under Article 12 of the New York Navigation Law for the costs incurred by the State in removing and cleaning up a discharge of a petroleum product from the Hornell Railroad Yard into the Canisteo River. On February 14, Conrail initiated a third-party action (the "environmental action") against Erie as successor corporation of the Debtor for any liability Conrail may incur by virtue of its acquisition of the Hornell Railroad Yard from the Debtor in 1976, and against the City of Hornell Industrial Development Agency for any liability Conrail may incur by virtue of Conrail's sale of the yard to the agency in 1978.

La Scala-Henning urge this reorganization court to reopen its final order dated November 30, 1982, which discharged the Debtor and Erie from all future liability, in order to permit the prosecution of their respective claims against the Debtor and Erie for asbestos-related personal injuries which may have occurred prior to the

final Discharge and Consummation Date of the Plan, but which did not manifest themselves until subsequent thereto. Conrail would also reopen the final bankruptcy discharge order to recover restitution from the Debtor and Erie for property damage which Conrail may have incurred as a result of the environmental action filed by the State of New York.

The issues presently confronting the Court were joined by Erie's petition seeking to declare the final discharge of the Debtor's estate and the final consummation of the Plan a bar against all post discharge claims asserted by La Scala, Henning and Conrail, and to permanently enjoin them from prosecuting their personal injury and/or property claims against the Debtor and Erie.

In effect, the asserted claims challenge the very essence of the Bankruptcy Act by seeking to compromise the finality historically accorded consummated reorganization plans and final discharge orders issued by reorganization and bankruptcy courts.

Stated differently, La Scala-Henning and Conrail seek to pierce the invulnerability of consummated plans of reorganization and/or final discharges in bankruptcy by mandating into perpetuity the right to file claims for post discharge manifested latent injuries allegedly incurred prior to the issuance of such final orders.

At this juncture in the proceedings, it should be noted that although this Court has temporarily enjoined the prosecution of the cases against the discharged Debtor and Erie pending disposition of this controversy, it has not interfered with the rights of La Scala-Henning to pursue their respective personal injury claims against Conrail and/or the manufacturers, distributors and installers of asbestos products which the parties continue to aggressively press. Nor has it interfered with the State of New York from pursuing its property claim against Conrail. Accordingly, the aggrieved parties are

not deprived of alternate sources of recovery for their asserted injuries.

Section 77(b) of the former Bankruptcy Act (formerly 11 U.S.C. §205(b)) provides the point of departure for this court's analysis of the issues here in question. That section reads in part as follows:

> Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, . . . and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well as those who have accepted it . . . The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan . . . Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. . . .

The quoted seminal legislative pronouncement explicated the classically accepted purpose of the Bankruptcy Act as the vehicle for providing the discharged Debtor with a fresh start. This articulated Congressional design was succinctly set out by the Court of Appeals for the Sixth Circuit in its frequently cited opinion interpreting the purpose of a substantially similar provision in another Section 77 proceeding:

> The provisions for reorganization could not be realized if the discharge of debtors were not complete and absolute. . . . [If] courts should relax the provisions of the law and facilitate the assertion of old claims against discharged and reorganized debtors, the policy of the law would be defeated. . . . [C]reditors would not participate in reorganizations if they could not feel that the plan was final. . . . [I]t would be unjust and unfair to those who had accepted and acted upon a reorganization plan if the court were thereafter to reopen the plan and change the conditions which constituted the basis of its earlier acceptance.

Duryee v. Erie Railroad Company, 175 F.2d 58, 63 (6th Cir.), *cert. denied*, 338 U.S. 861 (1949).

The court's announcement in *Duryee* underscored the fundamental premise that the complete and absolute discharge of the Debtor was the keystone to the credibility of the Bankruptcy Act which prompted the Debtor, its creditors and security holders to accept material and detrimental changes of position to consummate a plan of reorganization. To conclude otherwise would have forever destroyed the full faith and credit of the Act by decimating the incentive of certainty and finality upon which debtors, their creditors and security holders of necessity were required to rely and continue to rely under the new Code.

Indeed, the Supreme Court on numerous occasions has stated that one of the primary purposes of the Bankruptcy Act was to afford debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Perez v. Campbell*, 402 U.S. 637, 648, 91 S. Ct. 1704, 1710-11, 29 L. Ed.2d 233 (1971) (citations omitted). "A salient element in such a reorganization is the discharge of all demands of whatsoever sort, executory and contingent, presently due or to mature in the future." *City Bank Farmers Trust Co. v. Irving Trust Co. et al.*, 299 U.S.

433, 438-39, 57 S. Ct. 292, 295, 81 L. Ed. 324 (1937). In discussing the policy of according the reorganized company a fresh start as against asbestos related tort claims, the Court of Appeals for the Seventh Circuit has posited that "the purpose of allowing contingent claims to be proved and discharged in a reorganization is to make it likelier that the bankrupt firm can emerge from the reorganization with fair prospects of success, unhampered by the overhanging threat of liability for claims that had not been discharged . . ." *In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 756 F.2d 508, 523 (7th Cir. 1985) (citations omitted). If a final bankruptcy order were to be reopened to permit claims of the type here asserted, and again reopened each time a new claim is asserted "final decrees and the courts which render them would know no rest, and the policy of the Reorganization Act to launch the reorganized corporation upon a new business life undisturbed and unembarrassed by claims against its predecessor would suffer a serious defeat." *Duryee v. Erie R. Co.*, 91 F. Supp. 1009, 1012 (N.D. Ohio 1950), *aff'd*, 191 F.2d 855 (6th Cir. 1951) (memorandum), *cert. denied*, 342 U.S. 948 (1952).

Section 3.04 of the Consummation Order here in issue, in compliance with the dictates of the Act, provided finality to all past, present and contingent future claims against the Debtor and Erie and discharged them from all debts, obligations, liabilities and claims.

This court is mindful of the recent decision of the United States Court of Appeals for the Third Circuit in *Schweitzer v. Consolidated Rail Corporation (Conrail) and the Reading Company, et al.*, 758 F.2d 936 (3rd Cir. 1985), which reversed two trial court decisions addressing analogous issues as here presented. Prior to examining the logic of the circuit court's reasoning in that decision, this court is prompted to momentarily digress and review the direct and lucid analysis of the trial court

in those proceedings which confronted issues identical to those of the case at bar.

The District Court for the Eastern District of Pennsylvania barred similarly situated parties from reopening confirmed immutable Plans of Reorganization by anchoring its decision upon the essential elements of certainty and finality integral to all discharges in bankruptcy. *Schweitzer v. Consolidated Rail Corp.*, 36 Bankr. 469 (E.D. Pa. 1984), *rev'd*, 758 F.2d 936 (1985). In its disposition, the trial court summarized by favorably quoting from the identical case of *In re Central Railroad Company of New Jersey*, 38 Bankr. 686 (D.N.J. 1983), wherein that court stated:

> Allowance of the claims asserted here and those that would likely follow in the future, would have a substantial impact upon the reorganized company. Furthermore, to permit the estate to be reopened each time a new claim is discovered would preclude any finality to the reorganization proceeding.

In re Central Railroad Company of New Jersey, 38 Bankr. at 689.

The *Schweitzer* trial court thereupon proceeded to reason that:

> While it may be harsh to those claimants whose injuries did not become manifest until after the debtor's estate was closed, their claims cannot be heard. This result is inescapable due to the need to be consistent with the expectations of the creditors and stockholders who participated in the reorganization.

Schweitzer, 36 Bankr. at 472.

Thus the immutable finality accorded discharges in bankruptcy and/or plans of reorganization by both the *Schweitzer* and *Central Railroad Company of New Jersey* (CNJ) trial courts would foreclose all pre and post consummation order claims including contingent or "future" claims of the type advanced by La Scala-Henning and Conrail.

Returning to the assessment of the Third Circuit's opinion in *Schweitzer*, this court's attention is initially directed to the inescapable conclusions conceded by the court:

> Section 77(b) in pertinent part provides that a plan of reorganization "shall include provisions modifying or altering the rights of creditors." "Creditors" include "all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this [Act]." "Claims" include "debts, whether liquidated or unliquidated . . . , or other interests of whatever character." 11 U.S.C. §205(b) (repealed 1978).
>
> Section 77(f) provides that confirmation of the reorganization plan is binding upon "all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." Moreover, if the plan so provides,
>
> > [t]he property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities.
>
> 11 U.S.C. §205(f) (repealed 1978).
>
> The quoted statutory language clearly provides broad authorization for the discharge in bankruptcy of claims against the debtor in order to secure a fresh start for a company resulting from a section 77 reorganization. It is equally clear that plaintiffs' rights only could have been affected by the discharge of all "claims" against their employer if they had "claims" within the meaning of section 77 prior to the consummation date of their employer's reorganization.

Schweitzer, 758 F.2d at 941.

Having acknowledged the sweeping scope and inclusiveness of the terms "claim" and "creditor" within the context of Section 77 of the Act, the circuit court proceeded to severely constrict its application of the Act and reasoned that the plaintiffs' FELA causes of action, to come within the orbit of "dischargeable" claims under Section 77, had to exist prior to the relevant consummation date. Although it further acknowledged that under certain circumstances a cause of action could "exist" before it "accrued", it concluded that these FELA plaintiffs had no cause of action prior to final consummation because they did not at that time have compensable injuries pursuant to general principles of tort law. It articulated the above conclusion while recognizing that the term "claim" as defined in Section 77 "included debts, whether liquidated or unliquidated, securities . . . , liens or other interests of whatever chara ter" and that the term "Creditors" included "all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act . . ." *Id.*[3]

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[3] It is interesting to note that the definition of "claim," when read together with the definition of "creditor" under Section 77, is identical in substance to the definition of "claim" found in Chapter 10, Section 106(1) (former 11 U.S.C. §506), dealing with corporate reorganizations. The definition in the latter section has been construed as "sweeping in scope":

> Within its purview is any character of a claim against the debtor or its property, whether or not such claim is provable under §63 of the Act, and whether secured or unsecured, liquidated or unliquidated, fixed or contingent. This is, of course, a more inclusive definition than that applicable in ordinary bankruptcy, and it should be given a broad construction with respect to claims and creditors in order to dispose of all liabilities of the debtor in reorganization. *In Re Stirling Homex Corp.*, CCH Bank. Dec. ¶66,850 (2d Cir. 1978), *quoting* 6 Collier on Bankruptcy ¶2.05, at 306 (1978).

It went on to state further that without a legal relationship between tortfeasor and tort victim there could not be any cognizable "interest" under Section 77. Consequently, there could be no legal relationship between Reading and Central Railroad Company of New Jersey (CNJ) and their employees-plaintiffs relevant to the employees' future tort actions from which a Section 77 "interest" could flow.

Thus, by emphasizing the injury element of the FELA tort claims and ignoring the express definitions of "claim" and "creditor", and further by mandating the manifestation of injury as a prerequisite to the existence of a "claim" or "right" cognizable in bankruptcy, the Third Circuit literally read into the Section 77 definitions of "claim" and "creditor" the provability and "right to payment" requirements that had been expressly deleted from those definitions.

The Third Circuit cited to four factors as support for its analyses and conclusions. In discussing factors one and two, it noted that the defendants in *Schweitzer* failed to cite a single opinion, other than the district court opinions in those cases, holding that a tort cause of action as yet nonexistent under applicable tort law is a contingent claim within the meaning of the Bankruptcy Act or Bankruptcy Code. However, the court then attempted to distinguish and discount the Second Circuit decision interpreting Section 77(b) of the Bankruptcy Act in *In re Radio-Keith-Orpheum Corp.*, 106 F.2d 22 (2d Cir. 1939), *cert. denied*, 308 U.S. 622 (1940), as not controlling in *Schweitzer*. It stated that in *In re Radio-Keith-Orpheum Corp.*, although there had been no breach of the controversial lease agreement there in issue and thus no existing cause of action pursuant to the guarantees in the lease, there was a guarantor-guarantee legal relationship from which an interest in the guarantee could flow. This was purportedly in contrast to *Schweitzer*, wherein the court concluded the plaintiffs had no "inter-

ests" of any character before injury manifested itself since there was no legal relationship as between the tortfeasor and a tort victim until the tort had actually occurred. The argument, however, ignores the statutory "legal relationship" imposed by the FELA upon former railroad employers to provide their employees with a safe place to work. The analogous legal relationship imposed by the FELA undermines the very foundation of the Third Circuit's statement that in contrast to the private guarantee arrangement in *In re Radio-Keith-Orpheum Corp.* (holding such arrangement created a cognizable "interest" under Section 77 (B)), railroads and their employees had no statutory "legal relationship." Since railroad employees "bargained" for a safe place within which to work free of negligence, and this was guaranteed by the employer, there did in fact exist a legal relationship from which an interest could flow.

Third, the circuit court cited to the congressional intent as support for its conclusions. This court's research has been unable to surface even an inferential indication for the circuit court's statement. The Court's statement addressing congressional intent appears to be sheer conjecture.

Fourth, the circuit court's reliance upon *Mooney Aircraft Corp. v. Foster*, 730 F.2d 367 (5th Cir. 1984) is misplaced. In *Mooney*, wrongful death actions were commenced against the ultimate purchaser of the debtor's assets, some five years after the first transfer of those assets, under a theory of common law successor liability. The Fifth Circuit concluded that absent a "provable" claim by the plaintiff under Section 63 of the Bankruptcy Act, the bankruptcy court was without jurisdiction to enjoin the plaintiffs from pursuing actions against the successor corporation. Since, as previously set forth, the provability requirement of Section 63 of the Act was discarded in Section 77, *Mooney* is not relevant to the analysis of the propriety of permitting La Scala Henning

to pursue claims against Erie. Section 77 does not require a claimant to demonstrate a "right to payment" to support a claim. All that is required is that the claimant have a cognizable interest regardless of whether the underlying claim is contingent or in futuro and regardless of its provability during reorganization.[4]

In contrast to the conclusions in these cases, a number of courts have affirmatively decided that in asbestosis cases future claimants have an "interest" in bankruptcy proceedings of sufficient magnitude to warrant the appointment of a representative to protect their "interests" by the bankruptcy court. In *In re Johns-Manville Corp.*, 36 Bankr. 743, 753, the court, in considering the right of future asbestosis claimants to be declared "parties in interest" so as to permit their participation in ongoing reorganization proceedings stated:

> In the instant case, this comprehensive definition of bodily injury covering mere exposure militates in favor of a declaration that those who have been exposed

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[4] This court does not place the same reliance upon *Avellino & Bienes v. M. Frenville Co., Inc. (In re M. Frenville Co., Inc.)*, 744 F. 2d 332 (3d Cir. 1984), as is accorded that citation by both the Third Circuit in *Schweitzer* and by Conrail in its brief.

Initially it should be noted that *In re M. Frenville Co., Inc.* arose under 11 U.S.C. Section 362(a) of the Bankruptcy Code and not under Section 77 of the Bankruptcy Act. The issue in that case was the application of the automatic stay provision of the Code to pre bankruptcy acts of the debtor wherein the cause of action from those acts accrued post petition. (The proceeding was on-going since no final discharge had issued.) The court was not confronted with dischargeability under Section 77 of the Act as in this case. The pivot of the Court's decision turned on the definition of "claims" under 11 U.S.C. Section 101(4). That definition directs that the claimant have a "right to payment" regardless of whether that claim is unliquidated, contingent, immaterial and disputed. The court stated at page 36:

> the threshold requirement of a claim must first be met—there must be a "right to payment".
>
> Section 77 of the Act required no such condition.

to asbestos pre petition and have manifested or will manifest disease post petition are parties in interest to this reorganization case.

Thus, this policy underlying the finding that mere exposure triggers coverage likewise militates in favor of a declaration that future claimants are parties in interest.

The reasoning in *In re Johns-Manville Corp.* is in harmony with the Third Circuit's decision in *In re Amatex Corp.* 755 F.2d 1034 (3rd Cir. 1985), wherein the Third Circuit reversed the district court and, in an apparent contradiction of the *Schweitzer* reasoning, recognized the existence of future claimant "interests" in on-going bankruptcy proceedings:

> We conclude that future claimants are sufficiently affected by the reorganization proceedings to require some voice in them. Moreover, none of the parties currently involved in the reorganization proceedings have interests similar to those of future claimants, and therefore future claimants require their own spokesman.

The court continued:

> Moreover, by terming future claimants parties in interest we do not prejudge the difficult questions of whether and how to protect their interests most effectively.

In re Amatex Corp., 755 F.2d at 1042-43.

In its disposition of Amatex, the Third Circuit in characterizing future claimants as parties in interest to the reorganization proceedings nevertheless deferred into the future a decision of "whether future claimants can or should be considered 'creditors' under the Code." *Id.* Subsequently, in *Schweitzer* it concluded that such individuals did not have "dischargeable claims" and were not therefore "creditors".[5] It would appear that the existence

[5] *In re Amatex Corp.*, 30 Bankr. 309 (Bankr. E.D. Pa. 1983), 37 Bankr. 613 (E.D. Pa. 1983), *rev'd*, 755 F. 2d 1034 (1985), like *In re*

UNR Industries, Inc., 20 Bankr. 741 (N.D. Ill. 1983), *appeal dismissed*, 725 F. 2d 1111 (7th Cir. 1984) is distinguishable from the case at bar in a number of material respects. Initially, both reorganization proceedings were voluntarily commenced by the respective manufacturers of asbestos products in fear of an anticipated proliferation of future asbestos related litigation and the potential liability and legal costs arising as a result thereof which would be beyond the company's ability to manage, control or pay. Secondly, both Amatex and UNR were being reorganized as ongoing concern. Thirdly, in both instances the courts were petitioined by the debtors to appoint a guardian to represent the interests of future asbestosis claimants. Fourth, no final order of discharge or consummated plan of reorganization had issued in either proceeding. Lastly, both actions were being conducted pursuant to the present Bankruptcy Code, 11 U.S.C. §101 *et seq.* and not under Section 77 of the Bankruptcy Act §205 which constituted Chapter VII of the Bankruptcy Act.

In both instances the district courts refused to appoint a representative to represent interests of individuals who had in some way been exposed to asbestos and who could eventually seek damages from the debtors for injuries resulting therefrom. In both cases the district courts' opinions evolved from an interpretation of the Bankruptcy Code, particularly 11 U.S.C. §101(4)(A), 101(9) and 105, and not Section 77 of the Bankruptcy Act. The courts reasoned that under the Code the existence of a claim sounding in tort accrued when an individual suffered injury. Thus, the claim of an asbestos plaintiff did not arise under *state law* until the plaintiff knew or should have known about the injury; consequently since asbestos exposed plaintiffs had no claim under state law for asbestos related diseases until injury became known, they had no cognizable claims under the Bankruptcy Code and were, therefore, not creditors.

In *In re UNR Industries, Inc.*, 725 F. 2d 1111 (7th Cir. 1984) the U.S. Court of Appeals for the Seventh Circuit dismissed the appeal for jurisdictional reasons by holding that the order of the district court was not a final appealable order and also failed to qualify under the "collateral order" doctrine created by the Supreme Court in *Cohen v. Beneficial Industrial Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).

In its decision the court expressed serious reservation about the lower court's disposition of the matter when it stated:

> Even in states where exposed workers are not injured in a tort sense till the disease manifests itself, and therefore do not have an accrued tort claim in any sense, and even assuming that an

of future claimant "interests" within Third Circuit precedent would materially vary in pre-petition ongoing reorganization proceedings and post discharge final

[5] (Cont'd)

unaccrued tort claim cannot be a "claim" within the meaning of 11 U.S.C. §101(4)(A) (that is, a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured"), a bankruptcy court's equitable powers (on which *see, e.g., Pepper v. Litton*, 308 U.S. 295, 304, 60 S. Ct. 238, 244, 84 L. Ed. 281 (1939); 1 Remington, A Treatise on the Bankruptcy Law of the United States §22 (Henderson 5th ed. 1950) just might be broad enough to enable the court to make provision for future asbestosis claims against the bankrupt when it approved the final plan of reorganization. The date on which a person exposed to asbestos happens to develop a diagnosable case of asbestosis is arbitrary. Could it not be argued therefore that a bankruptcy court can and should use its equitable powers, which traditionally "have been invoked to that end that . . . substance will not give way to form, that technical considerations will not prevent substantial justice from being done," 308 U.S. at 305, 60 S. Ct. at 244 (especially, perhaps, in a reorganization case, *see In re Michigan Brewing Co.*, 24 F. Supp. 430 (W.D. Mich. 1938)), to prevent the liquidation or discharge of the bankrupt before provision is made for such persons?

In re UNR Industries, Inc., 725 F. 2d at 1119.

As hereinbefore noted, the Third Circuit in *In re Amatex Corp.* reversed the district court and declared that future asbestosis claimants were cognizable parties in interest to the reorganization proceedings.

In commenting upon the logic expressed by the trial courts in *Amatex* and *UNR*, Judge Lifland in *In re Johns-Manville Corp.*, 36 Bankr. 743 (Bankr. S.D. N.Y. 1984) rejected, out-of-hand, the court's rationale on the issue of dischargeability:

> It is the view of this Court that the declarations by Judges Hart and King that these future claims are nondischargeable in bankruptcy are based on superannuated and considerably narrow notions of what constitutes a claim dischargeable in bankruptcy. These notions are at odds with the expanded definition of "claim" contained in Section 101(4) of the Code . . . Congress specifically intended to afford the broadest possible scope to the definition of "claim" so as to enable Chapter 11 to provide pervasive and comprehensive relief to debtors. 36 Bankr. at 754, n. 6.

dispositions. The Third Circuit failed to address the apparent contradiction between its decisions in *Amatex* and *Schweitzer.*

In summary, this court is impressed by the comprehensive analysis of Judge Fullam in *In the Matter of Penn Central Transportation Company*, 42 Bankr. 657 (E.D. Pa. 1984), which strikes to the very heart of the issue confronting this court. In that railroad reorganization proceeding the petitioners sought leave of the reorganization court to pursue antitrust actions against the Penn Central Corp. (PCC), the reorganized company which was formed as part of the Plan of Reorganization of the Penn Central Transportation Company (PCTC), the Debtor in Section 77 reorganization proceedings. The court had issued its confirmation of the Plan of Reorganization and its Order of Consummation of the Plan on August 17, 1978, and October 24, 1978, respectively pursuant to Section 77(f) of the Bankruptcy Act.

Notwithstanding the injunctions imposed by the orders and Section 77(f) against suits against PCC, petitioners filed complaints alleging antitrust actions against PCC and others on September 17, 1980 and March 5, 1981. The actions by Pinney Dock and Litton (Petitioners) were founded on conduct of PCTC or its corporate predecessors.

Petitioners' antitrust claims were obviously not satisfied or even considered under the Plan. It was agreed between the parties that the petitioners did not have evidence of the alleged antitrust conspiracy until 1979. The petitioners argued that an unknown and undisclosed claim could not have been discharged under Section 77 of the Bankruptcy Act. The district court framed the issue in the following terms:

> Petitioners' approach actually raises the issue of the finality of the Confirmation Order: Does this Court have authority to exempt petitioners' antitrust actions

or claims from the discharge of § 77(f)?

Penn Central, 42 Bankr. at 666.

The court thereupon traced the evolution of Section 77 from the 1947 Supreme Court decision rejecting a railroad debtor's effort to reopen a confirmed plan of reorganization and to modify the plan. *Insurance Group Committee v. Denver & R.G.W.R. Co.*, 329 U.S. 607, 67 S. Ct. 583, 91 L. Ed. 547 (1947). It described the congressional reaction to the Supreme Court decision and the promulgation of P.L. 478 and its relationship to Section 77 of the Bankruptcy Act.

> Under P.L. 478, once an order of confirmation became final, the court could not reconsider or modify the plan. Finality of a confirmation order was defined to be expiration of the time within which to take an appeal or exhaustion of appeals which were taken.

Penn Central, 42 Bankr. at 666. The Court thereupon concluded:

> When §77 and P.L. 478 are considered together in the context of the finality accorded plans of reorganization and arrangement under Chapters X and XI of the Act, the conclusion which must be drawn is that a §77 plan of reorganization may not be altered once the order confirming the plan becomes final. Even if it is assumed that this court has residual equitable power to permit petitioners to participate under the PCTC's Plan of Reorganization, any potential exercise of that authority at this late date must be considered in the context of the long-standing bankruptcy policy that confirmation orders are final and the rights of the original participants under the Plan and third parties dealing in reorganization securities must be adequately protected.

Id. at 667.

Judge Fullam's concise disposition of the finality issue is an appropriate summary of the arguments presented by the parties to the case at bar.

La Scala-Henning and Conrail further charge a procedural due process infringement in the form of the Debtor's failure to provide adequate notice of the reorganization proceeding to permit interested parties to be heard. La Scala-Henning, although not claiming a total absence of notice, assert the right to personal notice. Conrail, on the other hand, disclaims notice in any form whether personal or by publication.

The Bankruptcy Act imposed wide discretion upon courts to designate the time and form of notice due with the caveat that such notice and opportunity for hearing be reasonable and appropriate in each case. *In re DCA Development Corporation*, 489 F.2d 43 (1st Cir. 1973). The court, in each instance, is required only to balance the individual's interest against the overall interest of efficient, final resolution of the claims, always mindful of the diminution of the Debtor's assets that may result from delay.

The First Circuit in *DCA* also stated:

> Moreover, even where formal notice to affected parties is omitted or is insufficient, informal or constructive notice which provides them with the same opportunity for a fair hearing can satisfy the procedural requirements of the Bankruptcy Act.

Id. at 47.

The conclusions articulated by the First Circuit in *DCA* merely restated the ultimate precedent enunciated by the Supreme Court as early as 1950 in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), which is dispositive of the Fourteenth Amendment due process issue of notice joined herein.

The due process infringement charged by La Scala-Henning, as interpreted by this court, is not the lack of notice but rather the form of the notice. More specifically, these putative claimants insist that only personal notice would have satisfied the constitutional require-

ments of due process. This contention is inapposite to existing precedent. *Mullane*; *American Land Co. v. Zeiss*, 219 U.S. 47, 31 S. Ct. 200, 55 L. Ed. 82 (1911). Apart from the foregoing, the putative claimants argue that "No notice issued during the course of the Erie reorganization proceeding was intended to, or did, provide any notice to future claimants that their unknown, unknowable, future claims would be discharged if they did not file proofs of claims." (Brief Conrail, p. 21) The argument infers an affirmative duty on behalf of the Debtor to notice claimants individually of the existence and nature of their claims. Neither Section 77 nor the Bankruptcy Act imposed such a requirement. Moreover, the Supreme Court in *Mullane* repudiated any such duty upon the Debtor to investigate or anticipate possible future claims under circumstances where, as here, the Debtor had no knowledge of the existence of such future claims:

> Nor do we consider it unreasonable . . . to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee . . . We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral, and we have no doubt that such impractical and extended searches are not required in the name of due process.

339 U.S. at 317-18.

The Bankruptcy Act placed the duty to assert claims squarely upon the shoulders of the claimant.

In the interests of conserving time and space, this court will not review its implementation of the generous provisions of Section 77(c)(7) and related sections of the Act that outlined the proof of claim requirements. Suffice

it to say that the procedure adopted and pursued by this court conformed to or exceeded the mandates imposed by law. The liberal procedure was closely monitored by a Special Master appointed by the Court. Apart from soliciting the filing of claims by personal and constructive service, extensive public notice of filing dates and procedures for obtaining simplified standardized forms was widely publicized. Moreover, it is interesting to note that employee interests were effectively protected by the Railway Labor Executives Association (RLEA)[6] and the

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[6] On November 19, 1972 the Railway Labor Executives Association (RLEA) moved this court to intervene as a party in interest to the reorganization, which motion was granted. The RLEA alleged that its intervention was predicated upon the following facts as asserted in its motion:

> The individual organizations [hereinafter listed] are the duly recognized representatives under the Railway Labor Act, 45 U.S.C.A. 151 *et seg.* for a substantial number of all railroad employees in the United States and have negotiated collective bargaining agreements with individual railroads pursuant to such representation . . . The employees of the Debtor Erie-Lackawanna Railway Company represented by the individual railway labor organizations affiliated with the Association have a substantial property and financial interest in actions which may be taken during the course of the present proceedings . . . The interest of the employees represented by the organizations affiliated with the Association will not be represented by any other party to this proceeding and such employees will be bound by judgments entered herein. The Association therefore submits that the grant of the motion by it and those affiliated organizations which represent employees on [sic] the Debtor Railroad to intervene in this proceeding in representation of interest of the employees of the Debtor Railroad, whose employment is governed by collective bargaining agreements between the Debtor Railroad and such affiliated railway labor organizations, is appropriate . . .

Its listed affiliates are: American Railway Supervisors' Association; American Train Dispatchers' Association; Brotherhood of Locomotive Engineers; Brotherhood of Railroad Signalmen; Brotherhood Railway Carmen of the United States and Canada; Brotherhood of Sleeping Car Porters; Int'l Assn. of Machinists & Aerospace Workers; Int'l Brotherhood of Boilermakers and Black-

Congress of Railway Unions (CRU)[7] which tracked the reorganization of the Debtor from the dates of their intervention on November 19, 1972 and March 30, 1973, respectively, to the final consummation of the Plan in November of 1982. During that period of active and aggressive participation in the reorganization of the Debtor by these organizations, nothing foreclosed the

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[6] (Cont'd)

smiths; Int'l Brotherhood of Electrical Workers; International Brotherhood of Firemen & Oilers; International Organization Masters, Mates & Pilots of America; National Marine Engineers Beneficial Association; Railroad Yardmasters of America; Railway Employes' Department, AFL-CIO; Sheet Metal Workers' International Association.

[7] On March 30, 1973 the Congress of Railway Unions (CRU) moved this court to intervene as a party in interest to the reorganization, which motion was granted. The CRU alleged that its intervention was predicated upon the following facts as asserted in its motion:

> The railway labor unions listed above are the legally selected and duly recognized representatives of the majority of all railroad employees in the United States . . . [T]he listed unions have negotiated collective bargaining agreements with virtually all of the railroads in the United States, including the Erie Lackawanna Railway Company . . . The employees of Erie Lackawanna Railway Company represented by the individual railway labor organizations affiliated with the CRU have a substantial property and financial interest in actions which may be taken during the course of the present proceeding . . . The interests of the employees represented by CRU through its member unions will not be represented by any other party to this proceeding and such employees will be bound by judgments entered herein.

The CRU includes as its members the chief executive officers of the hereinafter identified national and international railway unions: Brotherhood of Maintenance of Way Employes; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers; Express and Station Employes; Hotel & Restaurant Employes and Bartenders International Union; Seafarers' International Union of North America; Transport Workers Union of America; United Transportation Union.

initiation of action similar to that approved in *Amatex, supra* and *In re Johns-Manville Corp, supra* designed to protect the future rights of putative asbestos exposed employees before the final discharge of the Debtor and Consummation of the Plan. Such action would have permitted the trustees, creditors, security holders and the Court to consider the potential and magnitude of future claims in the formulation of the Plan and thereby would have insured against the catastrophic inequities that will arise as a result of post discharge post consummation recognition of such claims. This is especially true in light of the known injurious effects of asbestos exposure during the years before November 30, 1982, as is evidenced by the filing of more than 16,000 legal actions against manufacturers, distributors and installers of asbestos products during the years before August 26, 1982, the date on which Johns-Manville Corp. and its affiliates sought protection under Chapter 11, of Title 11 of the United States Code as a result of this great proliferation of asbestos litigation.

Equally without merit is Conrail's charge of defective notice when it is remembered that on April 1, 1976, most of the Debtor's properties and most of the Debtor's employees were transferred to Conrail. Throughout the restructuring of the northeast railroads, Conrail was an integral part of the reorganization proceeding. As a matter of fact, Conrail's existence was the direct result of the reorganizations of the northeastern railroads including the Debtor.

Under existing circumstances, it is inconceivable that the former employees of the Debtor and Conrail were not aware of the bankruptcy proceedings.

This court concludes that the notice by publication implemented during the reorganization proceedings pursuant to Section 77 of the Bankruptcy Act and the mandates of *Mullane* afforded La Scala-Henning and Conrail the opportunity to appear and be heard and to assert

their interests of whatever character during the pendency of the reorganization. Having failed to assert their interests which this court qualifies as claims under Section 77 of the Bankruptcy Act and, therefore, cognizable before the consummation of the Plan, La Scala-Henning and Conrail have lost the opportunity to have those interests evaluated in relation to the many other compelling and competing interests which were asserted during the reorganization.

The proceedings in reorganization having been concluded, the La Scala-Henning and Conrail claims are barred.

Accordingly, this court concludes that:

1. The purpose of Section 77 of the former Bankruptcy Act 11 U.S.C. §205 was to accord finality to reorganizations consummated under the Act.
2. A Section 77 claim "includes debts, whether liquidated or unliquidated, securities . . ., liens or other interests of whatever character" (former 11 U.S.C. § 205(b)) and the term "creditor" includes "all holders of claims of whatever character against the Debtor or its property." These definitions include the type of contingent or future claims asserted by La Scala-Henning and Conrail.
3. Claims were required to be filed in Section 77 reorganizations within the time fixed by the reorganization court, subject to the liberal provisions of Section 77(c)(7) for filing late claims. Under Section 77 of the Bankruptcy Act and the Bankruptcy Code, claims which were asserted after confirmation and consummation were discharged and there was no exception made for claims which were unknown to a claimant until after consummation of the Plan.
4. The La Scala-Henning and Conrail "claims" were cognizable during the reorganization proceeding

and were discharged by Orders No. 1222 and 1235 issued by this court.

5. After April 1, 1976 the Debtor's limited resources precluded its reorganization as an ongoing business entity and its Plan evolved pursuant to Section 77, as a "liquidating" plan consistent with §601(b)(4) of the Rail Act.
6. On April 1, 1976, the bulk of the Debtor's rail properties were conveyed to Conrail, thereby concluding the Debtor's tenure as an operating railroad.
7. On consummation of the Debtor's Plan of Reorganization, the remaining property of the Debtor was transferred to the reorganized company, Erie Lackawanna Co., free and clear of any claims against that property, and Debtor's liabilities of whatever character were discharged.
8. The alleged tortfeasor Debtor Erie Lackawanna Railway Company no longer exists, and the reorganized company is not a corporate successor to the Debtor in the ordinary sense.
9. The comparative positions between La Scala-Henning and Conrail and those now holding interests in Erie, the reorganized company, and the balancing of those interests must be equated consistently with the policy dictates of Section 77. Any relief accorded to these putative claimants would ultimately prejudice the present owners and creditors of Erie by a diminution and dilution of their interests. Consequently, any relief in favor of the post confirmation putative claimants from the Order of Confirmation would be inappropriate and is denied.
10. No statutory or constitutional defects in the proof of claims program and the form notice implemented by the reorganization court having been demonstrated, the discharge under Section 77

and the Bankruptcy Act is an absolute bar to the post confirmation claims asserted herein.

It is therefore ordered that Erie's petition for declaratory and injunctive relief is hereby granted. Attorneys for Erie shall submit an order in conformity with this decision by not later than June 30, 1985.

IT IS SO ORDERED.

/s/ ROBERT B. KRUPANSKY

Robert B. Krupansky,
United States Circuit Judge
United States Court of Appeals
for the Sixth Circuit
Sitting by designation

APPENDIX F

COSTS OF ASBESTOS LITIGATION*

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1983

OVERVIEW OF THE ASBESTOS LITIGATION PROBLEM

Asbestos product liability litigation is a large and complex problem because asbestos injuries are complicated, because large numbers of people allegedly have been injured, and because the law that controls their compensation is complex.[1] This section outlines those complica-

[1] For readers who are not familiar with product liability litigation, the following is a brief and greatly simplified sketch of its legal aspects. Personal injury suits brought by workers and others exposed to asbestos are almost always based on the legal theory of strict liability. These plaintiffs must demonstrate that they were exposed to asbestos or a product containing asbestos that was manufactured or provided by the defendant, and that they have suffered from a disease caused by such exposure. In most jurisdictions, they must be prepared to show that the defendant knew or should have known that the exposure to asbestos subjected them to a health risk. They must show that the defendant either failed to warn them of the risk or that the warnings were inadequate, and that the failure to provide an adequate warning was responsible for their injuries. Plaintiffs who can demonstrate each of these elements may not prevail if they are barred by a statute of limitations, or may find their cases postponed with respect to certain defendants by a bankruptcy court stay issued with respect to a defendant seeking Chapter 11 reorganization.

*Excerpts from study published by the Rand Corporation, pp. 2-6, 8-11.

tions so that the cost data that are the main contribution of this report may be understood in context.

The asbestos litigation problem has at least ten salient dimensions, each of which we will review briefly:

Widespread and diverse uses of asbestos products.

Large numbers of allegedly seriously injured people and lawsuits.

Long periods of time between exposure and manifestation of injury.

Large numbers of suppliers and processors of asbestos and asbestos-containing products.

Uncertainty about the causes of injuries and financial responsibility for those causes.

High, if uncertain, stakes and expenses.

Effects, known and unknown, of Chapter 11 bankruptcy reorganizations.

Concentration of many cases in few courts.

Possible impact on other toxic substance torts.

Variety of proposed responses to the problems.

Properties and Uses of Asbestos. Asbestos is a fibrous mineral that is mined. It is strong, flexible, and resistant to fire, heat, and corrosion. It is an excellent insulator and is also commonly used in asbestos-cement products (e.g., pipe), brake linings, a number of roofing products, and flooring products. It has been used in millions of buildings in the U.S. and in hundreds of millions of automobiles.

Large Numbers of Allegedly Injured People and Lawsuits. Unfortunately, asbestos also causes disease. Asbestos fibers when inhaled may lead to asbestosis (a clogging and scarring of the lungs that can produce disabling reduced breathing capacity), or mesothelioma (a rapidly fatal cancer of the lining of the chest and abdomen for which one of the known causes is asbestos). Inhalation of asbestos fibers also has been associated with an increased incidence of lung cancer. Approximately 24,000 claimants had initiated lawsuits as of March

1983 alleging injury from exposure to asbestos. Very few had filed ordinary liability insurance claims without filing a lawsuit.

Several estimates of the number of deaths allegedly due to asbestos over the next 30 years have recently been made. All are large—from 74,000 to 265,000.[2]

Long Latency Periods. Generally, 15 to 40 years elapse between asbestos exposure and disease manifestation. Thus, for example, some shipyard workers' are only now filing claims alleging injury from World War II exposure to asbestos.

Large Number of Defendants. Asbestos plaintiffs typically do not sue their employers (who are usually protected from tort responsibility by workers' compensation laws), but rather bring suits against the asbestos miners, manufacturers, suppliers, and processors who supplied the asbestos or asbestos products that were used or were present at the claimant's work site or other exposure location. Thus, the potential defendants in any one case may consist of numerous organizations; the average is about 20. The cost implication is correspondingly major: Usually, 20 different defense teams prepare for and participate in litigation.

Uncertain Causes and Responsibility. Asbestos cases allege injuries that are often hard to identify with certainty, undetectable for decades after exposure, unpredictable from the simple fact of exposure, and arguably caused by a variety of other factors (such as smoking) that may produce the same pathology. It is not currently possible to establish precisely how much exposure to asbestos is either necessary or sufficient to cause any of the diseases allegedly associated with it, either with respect to any particular claimant or with regard to the universe of those exposed.

As a matter of strategy, many plaintiffs' lawyers seek

[2] For details, see "Overview of Previous Studies," below.

to involve as a defendant any party who might have provided asbestos or asbestos products to a client's workplace or other exposure location. Settlement efforts and trials must then face the difficult task of deciding whose products the plaintiff was exposed to and for how much of the time. But exposure is not the only issue. There may be disputes over which defendants had reason to know that asbestos exposure was a health risk and failed to warn of that risk, and disputes over the role of smoking or other plaintiff behavior in causing the alleged injuries.[3]

Determining the responsibility of insurance companies is every bit as difficult as that for defendants. Complex webs of insurance arrangements have been made, amended, unmade, and then remade by defendants over the decades during which most plaintiffs claim exposure to asbestos. For each defendant in each year, there is normally a separate set of layers of primary coverage, excess coverage, and reinsurance coverage. Also, there are often periods of self-insurance by the defendant, and occasionally insurance by a captive (defendant-owned) insurance company. Each layer of insurance in each year normally involves at least one carrier, and that carrier may or may not have been involved in that or another role during other years. Several major insurance carriers have many insured defendants, some of whom may have different interest, vis-a-vis each other, in any particular case.

The policies that provided coverage contain language that has given rise to protracted litigation concerning

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[3] Some research has found that susceptibility to lung cancer may increase by four to five times with exposure to asbestos, but by 50 times if the exposed subject also smokes. For a summary of this research, see Irving J. Selikoff, M.D., *Disability Compensation for Asbestos-Associated Disease in the United States*, Environmental Sciences Laboratory, Mount Sinai School of Medicine of the City University of New York, June 1981, Table 3.8.

the responsibility of the insurance carriers to respond to particular claims. In a nontrivial number of instances, it is even a serious issue whether any policy was in force; neither insureds nor carriers are able to produce papers that they had assumed long ago to be of no further relevance. But even where there is agreement that coverage did exist, there is nothing like accord between many defendants and their insurers, or among the insurers themselves, as to what is covered, when, and by whom. The basic uncertainty over insurance coverage has severely complicated relations between defendants and insurers, and has itself spawned a large number of lawsuits.

Besides that conflict, the role of the federal government is controversial. The government was, first of all, heavily involved with shipyards in various capacities; but it is also alleged by some to be responsible for worker injuries as a seller of asbestos, as a specifier of workplace safety standards for asbestos, and as a mandator of asbestos use in the military products it contracted for and purchased during and since World War II.

High Compensation Stakes and Expenses. Aggregate compensation to plaintiffs in asbestos cases will involve very substantial sums. This report provides data to increase the reliability of projections. Existing estimates vary from $4 billion to $38 billion over the next 30 years.[4] The expenses incurred in this litigation are also substantial. They have been alleged by others to equal, or perhaps exceed by four-fold,[5] the net compensation received by injured claimants.

The Chapter 11 Reorganizations. A new set of conditions and problems has been produced by the Manville Corporation, UNR Industries, and Amatex Corporation bankruptcy proceedings. A central issue is whether the

[4] For details, see "Overview of Previous Studies," below.

[5] David Lauter, "Footing the Bill for Toxic Torts," *National Law Journal*, January 31, 1983.

bankruptcy court can estimate and provide for future claims as part of a plan of reorganization. But the disruption caused by these bankruptcies has affected many different activities. Existing cases have been stayed with respect to defendants who have filed for Chapter 11 reorganization, the bargaining positions of both plaintiffs and defendants have been affected (but in ways not yet fully clear), and attorneys on both sides have been forced to spend substantial time concerned with the interests of existing and future claimants in bankruptcy instead of tort proceedings. The situation is dynamic and the ultimate impact on costs is as yet unclear.

The Concentration of Cases. Slightly over half of the pending cases are in the federal courts. Most of the state actions are pending in a dozen or fewer urban courts. The main factors determining where cases are filed seem to be (a) the degree to which the state law is perceived to be relatively favorable to asbestos plaintiffs, and (b) proximity to major users of asbestos, particularly World War II shipyards, which by themselves account for about half of all outstanding cases. Some major jurisdictions have very few asbestos suits; for instance, in New York the statute of limitations has been construed to run from the point of last exposure, so that the deadline for filing usually falls during the latency period before any disease can be detected. But the courts where the suits are concentrated have them in very large numbers, as in Los Angeles and Philadelphia, for example.

Impact on Other Toxic Substance Torts. The shape that responses to the problems posed by asbestos claims ultimately take is critically important to tens of thousands of injured workers and their families, to the businesses involved in asbestos mining, distribution, and use, to their insurers, perhaps to the government, and to the civil litigation system. The asbestos problem may be unique and hence warrant its own unique solution; on the other hand, it may be important as a precedent for other

toxic substances, especially if they are determined to have major consequences for public health.

Proposed Responses. Because the asbestos problem is immense and because it may influence public reactions to a set of major health and legal problems, many different responses have been and are being proposed. At least three generic lines of reform have been suggested by various people and organizations: Increased coordination and efficiencies within the existing tort system are being explored broadly and in depth; mediation, arbitration, and other forms of dispute resolution systems are being considered as alternatives to formal litigation; and various new, government-mandated compensation systems have been proposed. However, cooperation between agents of plaintiffs and defendants/insurers has been limited to date, as has the progress of federal legislation dealing with asbestos.

Fundamentally, the seriousness of the asbestos litigation problem rests on the facts that much human suffering is involved and that the financial consequences are so large and uncertain as to threaten the very viability of some of the corporate participants. This latter fact has been driven home by the bankruptcy filings that have already occurred. Some firms perceive the cost figures as large enough to move the problem out of the "difficult but manageable" class into the class of "this one could break us."

* * * *

OVERVIEW OF PREVIOUS STUDIES

A 1976 survey of approximately 3,000 product liability lawsuits by the Insurance Services Office[8] included only 51 asbestos-associated claims; of these, 29 received total compensation averaging $48,000 paid between July 1976

[8] Insurance Services Office, *Product Liability Closed Claim Survey: A Technical Analysis of Survey Results*, New York, 1977, p. 366.

and March 1977.[9] Expenses were not reported separately for asbestos cases. Since the great majority of closed asbestos-related lawsuits were closed in the 1980s, these few 1976 cases are mainly of historical interest.

A major study completed in 1981 by Irving Selikoff and his associates for the Department of Labor described and analyzed compensation experiences resulting from asbestos-associated occupational diseases.[10] They estimate that more than 21 million U.S. workers are still alive who were significantly exposed to asbestos over the last 40 years, and project 200,000 excess deaths (above the number normally expected in the population) by the end of the century from asbestos-associated disease. As a part of the Selikoff study, Peter Barth[11] conducted a study of compensation paid for asbestos-associated disease in 2,271 asbestos insulation workers who died between 1967 and 1976. He obtained data on 105 deaths that resulted in product liability lawsuits. The average court award for the eight tried cases was $57,750, and the average litigation expense paid by the plaintiff was $16,600. For 59 cases that resulted in settlements, the average compensation was $72,000, and the average litigation expense paid by the plaintiff was $28,500. (For cases where both legal fees and settlement were known, litigation expenses averaged 37 percent of the settlement amount, but ranged from 8 to 73 percent.) The incidence of lawsuits averaged 16 percent but rose with time from

[9] The $169,000 average per-claim figure that is often quoted from this ISO report was obtained by assuming the payment made in 1976 had actually been paid at the time of the "occurrence" of the bodily injury, and then *inflating by 25 percent per year.* The actual amount paid, however, averaged $48,000, not $169,000.

[10] Selikoff, op. cit.

[11] Peter S. Barth, *Compensation for Asbestos-Associated Disease: A Survey of Asbestos Insulation Workers in the U.S. and Canada*, Environmental Sciences Laboratory, Mount Sinai School of Medicine of the City University of New York, January 1981.

3 percent for 1967-1968 deaths to 32 percent for 1975-1976 deaths. The average compensation by cause of death for this small sample of cases was $46,000 for asbestosis, $61,000 for lung cancer, and $100,000 for mesothelioma.

A 1982 study headed by Paul MacAvoy[12] forecast the number of excess asbestos-related deaths and disabilities over the next 30 years, and estimated the resulting compensation payments generated by product liability lawsuits. The study reviewed various epidemiologic study projections and estimated excess mortality due to asbestos through the year 2015 at between 154,000 and 450,000, with the most likely estimate being 265,000. Since not all asbestos-related deaths will result in lawsuits, MacAvoy used information from Barth[13] to extrapolate the number of new lawsuits that would be filed. MacAvoy estimated that approximately 200,000 deaths will result in lawsuits.[14] The study further estimated that future compensation payments would be between $8 billion and $87 billion, with the "most likely estimate" of the present value[15] of the awards being $38 billion. The wide range indicates the high degree of uncertainty in the estimates. The low estimate is based on $100,000 per claim (obtained by inflating data on the amounts paid to survivors of only 105 asbestos insulators over the period 1967-1976).[16] What

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[12] Paul W. MacAvoy et al., "The Economic Consequences of Asbestos-Related Disease," Yale University School of Organization and Management, New Haven, Connecticut, Working Paper No. 27, January 1982.

[13] Barth, op. cit.

[14] Calculated by The Institute for Civil Justice from data presented in MacAvoy, op. cit. MacAvoy assumes that 32 percent of excess deaths resulted in litigation in 1975, that the percentage grew 4 percent per year, and that after 1992 all excess deaths will result in litigation.

[15] Future dollars discounted to 1980 present value dollars at 2 percent per annum.

[16] Barth, op. cit.

MacAvoy calls the "most likely estimate" is based on $233,000 per claim (obtained by inflating 1976 adjusted data from the previously mentioned ISO survey of product liability claims,[17] which included only 51 asbestos-related claims).[18] MacAvoy's "high estimate" is based on $350,000 per claim (obtained by averaging amounts reported in the *Asbestos Litigation Reporter* between August 1979 and September 1981; these predominantly were awards from trials that averaged substantially higher than the much more prevalent settlements). MacAvoy estimates defense legal and other expenses of this litigation to be 34 percent of awards and settlements, using data on all product liability cases closed in 1976 (only a few of which involved asbestos).[19]

The investment firm of Conning & Company has estimated that the insurance industry's ultimate liability for asbestos claims will be in the $4 to $10 billion range. The firm estimates the total number of claims filed by the year 2010 will be in the range of 83,000 to 178,000, which means at least 59,000 new claims above the 24,000 filed as of March 1983. The firm estimates that the average settlement was $35,000 per claim in 1980-81, but did not present data on expenses, which it assumes equaled the settlement amount.[20]

The Manville Corporation, in support of its Chapter 11 bankruptcy filing, has estimated that at least 32,000 new asbestos-related claims will be filed through the year 2001[21] that could require it to spend approximately $2

[17] Insurance Services Office, op. cit.

[18] Ibid. The actual unadjusted compensation per claim closed in that year averaged $48,000.

[19] Ibid.

[20] Conning & Company, *The Potential Impact of Asbestos on the Insurance Industry,* Hartford, Connecticut, September 1982.

[21] The Manville Corporation, "Summary of Asbestos-Related Litigation Projection," delivered to the organizational meeting of creditors of The Manville Corporation, New York, September 9, 1982.

billion. These estimates assume no increased propensity to sue over time, and a $40,600 disposition cost per case for the Manville Corporation and its insurers. By the year 2009, a study commissioned by the Manville Corporation foresees 5,963 new mesothelioma suits, 2,660 new lung cancer suits, and 27,150 new asbestosis suits.[22] The $40,600 figure was estimated by the Manville Corporation by taking an average expenditure per claim weighted by the number of claims of each type; specifically, they averaged their "current costs" of $75,000 in compensation per mesothelioma case, $45,000 per lung cancer case, and $25,000 per asbestosis case, plus average defense costs of approximately $7,500 for each case.[23] The $7,500 figure amounts to 23 percent of the compensation paid to the claimant.

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[22] A. W. Walker, *Projections of Asbestos-Related Disease 1980-2009, Final Report*, Epidemiology Resources, Inc., Chestnut Hill, Massachusetts, August 2, 1982, estimates 18,700 excess mesothelioma deaths and 55,120 excess lung cancer deaths through the year 2009.

[23] Testimony of Richard B. Von Wald, Vice President and Corporate Counsel, The Manville Corporation, at the *Oversight Hearings on the Effect of the Manville and UNR Bankruptcies on Compensation of Asbestos Victims*, Subcommittees on Labor Standards, Committee on Education and Labor, U.S. House of Representatives, Washington, D.C., September 9, 1982, p. 66.

APPENDIX G

Bankruptcy Act of 1898, former 11 U.S.C. §205:

Section 77. Reorganization of Railroad Engaged in Interstate Commerce.

(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization.

* * * *

If the petition is . . . approved, the court in which the order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose.

* * * *

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded

debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

* * * *

The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" included debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for al purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 60 of this Act shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) hereof. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

(c) After approving the petition:

(1) The judge shall forthwith (and in pending proceedings immediately upon the effective date of this amendatory section) require the debtor to give such notice as the order may direct to the mortgage trustees, creditors and stockholders, and to cause publication thereof for such period and in such newspapers as the judge may direct, of a hearing to be held not later than thirty days after the date of such order, at which

hearing or any adjournment thereof the judge shall appoint one or more trustees of the debtor's property.

* * * *

(4) The judge shall require the officers of the debtor or the trustee or trustees at such time or times as the judge may direct, and in lieu of the schedules required by section 7 of this Act, to file with the court such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; and shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor, and a list of all known stockholders of the debtor, with the last known post-office address or place of business of each, which lists the judge may require to be brought down to date at any time. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise.

* * * *

(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classification unless there be substantial differences in priorities, claims, or interests. The trustee or trustees under any mortgage, deed of trust, or inden-

ture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees in the representative or representatives of such holders for the purpose of accepting or rejecting any plan or reorganization.

(8) The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise.

* * * *

(d) The debtor, after a petition is filed as provided in sub-section (a), shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of the effective date of this Act, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less then 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less then 10 percentum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity

shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the nommission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of

this section, is fair and equitable, affords due recog nition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such masimum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

* * * *

If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: Provided, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding

the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less then the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: Provided further, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less then the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. . . . The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more then two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after

hearing, that it makes adequate provision for fair and equitable treatment for the interests of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e).

* * * *

If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his con clusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

* * * *

(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed whether or not approved, including creditors who have not, as well as those who have, accepted it. . . . The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the

plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provis ions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case.

* * * *

(j) In addition to the provisions of section II of this Act for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree: Provided, That suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction and any order staying the prosecution of any such cause of action or appeal shall be vacated.

* * * *

(k) A certified copy of the final order confirming a plan of reorganization, or of any other order or decree entered in a proceeding under this section, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and the fact that the order or decree was made.

A certified copy of an order directing the transfer and conveyance of the property dealt with by the plan as provided in subsection (f) of this section, or as specified in an order dismissing the proceedings as provided in subsection (i), shall be evidence of the transfer and conveyance of title accordingly, and if recorded shall impart the same notice that a deed, if recorded, would impart.

* * * *

(m) The term "railroad corporation" as used in this amendatory section means any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, a suburban, or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment. Wherever used in this section the term "person" shall include an individual, corporation, partnership, association, joint-stock company, unincorporated organization, or a government or political subdivision thereof.

(n) In proceedings under this section and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation. arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds executed by sureties without security for and in any action brought against such railroad corporation or trustee appointed pursuant to this section, shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad. . . .

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No. 84-2008

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

READING COMPANY
AND
CENTRAL JERSEY INDUSTRIES, INC.,
Petitioners,

v.

JOSEPHINE SCHWEITZER, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Were the present claims of railroad workers who were exposed to asbestos before their railroad-employer was reorganized, but who did not manifest any injury until after the consummation date of the reorganization, discharged in the reorganization proceeding?

DESIGNATION OF CORPORATE RELATIONSHIPS

Consolidated Rail Corporation, the only respondent that is a corporation, is not owned by any parent corporation. Consolidated Rail Corporation has an ownership interest in the following companies: Akron & Barberton Belt Railroad Company; Albany Port Railroad Company; Belt Railway Company of Chicago; Calumet Western Railway Company; Chicago & Western Indiana Railroad Company; Fruit Growers Express Company; Indiana Harbor Belt Railroad Company; Lakefront Dock & Railroad Terminal Company; Monongahela Railway Company; Nicholas, Fayette & Greenbrier Railroad Company; Peoria & Pekin Union Railway Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; and Trailer Train Company. Consolidated Rail Corporation does not have an ownership interest in any other company, except for its wholly-owned subsidiaries.

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit that this Court should deny the petition for a writ of certiorari. The petition seeks review of the opinion issued in this case by the United States Court of Appeals for the Third Circuit. The opinion is reported at 758 F.2d 936.

STATEMENT

The individual respondents are former railroad workers, spouses of former railroad workers, or personal representatives of deceased former railroad workers who were exposed to asbestos while employed by the Reading Company ("Reading") or the Central Railroad Company of New Jersey ("CNJ") during the period when Reading and CNJ operated railroads. That period ended on April 1, 1976, when, pursuant to Congress' mandate, Reading and CNJ transferred substantially all of their railroad operating properties to the newly formed Consolidated Rail

Corporation ("Conrail"). Several years before that transfer occurred, Reading and CNJ had each filed for reorganization under Section 77 of the now-repealed Bankruptcy Act of 1898.[1] Employee personal injury claims asserted during the reorganization proceedings were paid in full in cash under both the Reading and CNJ reorganization plans. Neither Reading nor CNJ gave any notice to its employees that it would consider claims for future injuries resulting from their railroad employment to be barred if not asserted during the reorganization proceedings. Indeed, employees with personal injury claims were exempt from the requirement of filing proofs of claims under specific orders entered in each reorganization.

CNJ's reorganization proceedings continued until September 14, 1979, and Reading's continued until December 31, 1980. Neither Reading nor CNJ was ever dissolved. Rather, as of their respective consummation dates, Reading and CNJ, which changed its name to Central Jersey Industries, Inc. ("CJI"), amended their corporate charters and emerged from reorganization with considerable assets, including non-rail properties, substantial federal income tax net operating loss carryforwards, and an entitlement to receive the value of the properties transferred to Conrail (since received in the form of cash payments).

After the consummation of the reorganizations, a number of former Reading and CNJ railroad employees manifested their first symptoms of asbestos-related diseases. They have averred that their diseases were caused, at least in part, by their exposure to asbestos during their employment by Reading and CNJ before the consummation dates. Beginning in 1981, the employees

1. The Bankruptcy Act of 1898 has since been replaced prospectively by the Bankruptcy Reform Act of 1978 ("Bankruptcy Code"), which went into effect on October 1, 1979, and applies to bankruptcy cases filed on or after that date.

instituted lawsuits against their former employers and Conrail, in which they asserted claims under the Federal Employers' Liability Act ("F.E.L.A."), 45 U.S.C. §§51-60, and related statutes. Although some of the employees had worked for Conrail as well as Reading or CNJ, several had never worked for Conrail.

Reading filed motions to dismiss eight cases filed against it in the United States District Court for the Eastern District of Pennsylvania. Conrail and the plaintiffs opposed the motions. The motions were transferred for decision to the Honorable J. William Ditter, Jr., who had presided over Reading's reorganization. Despite the plaintiffs' assertions that they had not manifested symptoms of asbestos-related disease until after the consummation date of Reading's reorganization, and despite Reading's admitted failure to notify its former employees that it would contend that any claims for occupational injuries that might develop in the future had been discharged in the reorganization proceeding, Judge Ditter held that the claims had been discharged by the consummation order entered in Reading's reorganization proceeding.

CJI accomplished the same result through a different procedural route. CJI sought and received from the Honorable Clarkson S. Fisher of the United States District Court for the District of New Jersey orders enjoining former CNJ employees from prosecuting the lawsuits for asbestos-related injuries that they had instituted against CJI and Conrail in a New Jersey state court and the United States District Court for the Eastern District of Pennsylvania. The plaintiffs in the CJI lawsuits, like the plaintiffs in the Reading lawsuits, averred that they had first manifested symptoms of asbestos-related injuries after the consummation date of their former employer's reorganization. CNJ, like Reading, had not notified its former employees that it would consider claims for injuries resulting from their railroad employment to have

been discharged in the reorganization even though the employees had not manifested any symptoms of such injuries as of the consummation date of the reorganization.

The Reading plaintiffs, the CJI plaintiffs, and Conrail appealed Judge Ditter's and Judge Fischer's orders to the United States Court of Appeals for the Third Circuit. The Court of Appeals reversed, holding that a claim in a reorganization proceeding must be founded on a substantive obligation created by either state or federal law, that the plaintiffs' F.E.L.A. causes of action did not come into being until the plaintiffs manifested symptoms of asbestos-related injuries, and that, accordingly, the plaintiffs did not have dischargeable claims under Section 77 of the Bankruptcy Act as of the consummation dates of the Reading and CJI reorganizations. Since the claims were not dischargeable, the consummation orders did not bar their assertion against Reading and CJI, the reorganized companies. The Court of Appeals remanded the cases for further proceedings.

REASONS FOR DENYING THE PETITION

The United States Court of Appeals for the Third Circuit decided only a narrow question in this case. The decision does not have the far-reaching consequences that petitioners (and others supporting their request for review) would ascribe to it; the decision is not in conflict with the decision of any other court of appeals or with any decision of this Court; and the decision is manifestly correct.

A. The Court of Appeals Decided a Narrow Question Concerning the Interpretation of Section 77 of the Now-Repealed Bankruptcy Act.

What the Court of Appeals for the Third Circuit decided in this case was that consummation orders in two railroad reorganizations, which discharged Reading and

CNJ from "all obligations, debts, liabilities and claims" as of the applicable consummation dates of their reorganizations, did not preclude former employees who had been exposed to asbestos while working for those two railroads from asserting F.E.L.A. claims for asbestos-related injuries that did not become manifest until after the consummation dates. The Court of Appeals rendered this decision in the context of a situation where no attempt had been made during the course of reorganization proceedings to deal with these potential future claims or to give notice to the potential claimants.

In its decision, the Court of Appeals held (1) that "as a matter of federal law, F.E.L.A. actions for asbestos-related injury do not exist before manifestation of injury" (Pet. App. 14a) and (2) that these railroad employees did not have "interests" within the meaning of Section 77(b) of the Bankruptcy Act before injury manifested itself (Pet. App. 15a). Hence, the Court of Appeals held that the Reading and CNJ consummation orders did not discharge the claims of these workers.

What the Court of Appeals for the Third Circuit expressly did *not* hold was that reorganization courts lack power to deal with potential future claims of this nature. To the contrary, the Court of Appeals specifically stated:

> Because this case does not present the question of what provision in a reorganization plan, if any, could be made for future claims such as these (*e.g.*, reserve or sinking funds, insurance, annuities, etc.) we do not address that issue here. (Pet. App. 17a n.1)

Thus, this case does not present the issue that petitioners seek to present in the first of their two "Questions Presented," namely:

> 1. Whether a reorganization court has *the power* to deal with and provide for latent future

> asbestos-related toxic tort claims as part of a reorganization of a debtor corporation under Section 77 of the Bankruptcy Act? (Emphasis supplied.)

The reorganization courts in this case did not purport to "deal with and provide for latent future asbestos-related toxic tort claims as part of a reorganization," and the Court of Appeals did not rule on the question of whether a reorganization court has the power to do so.

Nor does this case present the second issue raised by petitioners, namely:

> 2. Whether, assuming that a reorganization court has such authority, the court may bar such future claims, where the rail operations out of which such claims arose are, during the course of the reorganization, transferred to a solvent successor railroad?

The Court of Appeals did not rule that Conrail or any other entity was a "successor railroad"; the Court of Appeals did not decide whether the existence of a "successor railroad" would, in any event, relieve the "predecessor railroad" of liability; and the Court of Appeals quite properly rebuffed petitioners' efforts to raise the speculative issue set forth in the second question since neither Judge Ditter nor Judge Fisher had decided that issue in the courts below.[2]

What the Court of Appeals held was simply that the claims of former Reading and CNJ employees for

2. The issue of what liability, if any, Conrail may have to persons who have developed injuries from their exposure to asbestos during their employment by railroads that have been reorganized in bankruptcy is the subject of a declaratory judgment action in the Special Court, Regional Rail Reorganization Act of 1973 (*Consolidated Rail Corporation v. The Reading Company*, Civil Action No. 82-29). That action has been stayed pending a final decision in this case.

asbestos-related injuries were not barred by reorganization plans and consummation orders that did not make provision for such claims.

B. The Court of Appeals Decision Does Not Have the Far-Reaching Consequences Petitioners Would Ascribe to It.

Nowhere in its decision did the Court of Appeals purport to deny reorganization courts the "power to deal with and provide for latent future asbestos-related toxic tort claims as part of a reorganization." During the CNJ and Reading reorganizations, there was no attempt to deal with or provide for latent future asbestos-related toxic tort claims, and the Court of Appeals opinion does not even discuss what the reorganization courts could have done prospectively to deal with such claims.

Petitioners misstate the facts when they assert that the Court of Appeals "concluded that the reorganization courts lacked the power to discharge plaintiffs' claims" (Pet. 6), that "[t]he decision of the Court of Appeals for the Third Circuit . . . holds that a reorganization court lacks the power to fashion a remedy for future latent tort claimants" (Pet. 12-13) and that, if the decision below is allowed to stand, reorganization courts will be "powerless to protect the reorganized corporation from large and uncertain future toxic tort claims" (Pet. 14).[3] The Court

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3. Petitioners reiterate these misstatements elsewhere, claiming that "[t]his case presents important questions concerning the power of a reorganization court to deal with claims attributable to exposure to occupational diseases, such as asbestosis and mesothelioma, that are characterized by long latency periods" (Pet. 7), that the Court of Appeals held "that a reorganization court is powerless to deal with the rights of latent future claimants arising out of preconsummation tortious conduct by the debtor" (Pet. 8), that the Court of Appeals decision is a "holding that a reorganization court lacks the power to deal with the claims of employees and former employees of the debtor who have suffered only subclinical injury from occupational exposure to asbestos" (Pet. 8-9), that the

of Appeals did not have before it, nor did it address, the question of a reorganization court's power to deal with future latent tort claims in reorganization proceedings. Indeed, the word "power" appears only once in the entire opinion of the Court of Appeals — and then only when the Court refers to the district court's equitable reservation of jurisdiction (Pet. App. 9a). And, as noted above, the Court of Appeals explicitly declined to address the question of what, if any, provisions could be made in a reorganization plan for future claims such as these.

Furthermore, the Reading and CNJ reorganizations took place under the Bankruptcy Act of 1898, and it was that now-repealed statute that the Court of Appeals interpreted. Reorganization proceedings instituted on or after October 1, 1979, such as the present Johns-Manville Corporation reorganization referred to by petitioners, are governed by the Bankruptcy Code, a statute that the Court of Appeals did not interpret and that contains a definition of claim that differs from and is broader than the definition in Section 77 of the Bankruptcy Act. *See* 11 U.S.C. §101; H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977); S. Rep. No. 989, 95th Cong., 2nd Sess. 21 (1978).

Surely, it is far-flung speculation for petitioners to anticipate that the decision below (which does not even purport to deal with the question of what can be done in a pending reorganization proceeding) is likely to have an impact (let alone a far-reaching impact) on pending reorganization proceedings.

---

3. *(Continued)*
Court of Appeals "erred in holding that the reorganization court lacked the power to deal with future tort claims arising from preconsummation exposure" (Pet. 11), and that "[t]he central issue in these proceedings is . . . whether a reorganization court has the power to deal with future tort claims for latent asbestos-related injuries" (Pet. 12).

C. There Is No Conflict Among the Circuits.

No federal court of appeals has rendered a decision that conflicts with the decision in this case.

Petitioners seek to manufacture a pseudo-conflict by pointing to a recent decision by the Honorable Robert B. Krupansky, *In re Erie Lackawanna Railway*, No. B72-2838, slip op. (N.D. Ohio, June 18, 1985) (Pet. App. 62a-88a). Although Judge Krupansky is a member of the United States Court of Appeals for the Sixth Circuit, he was sitting by designation as a judge of the United States District Court for the Northern District of Ohio when he issued the opinion cited by petitioners. This Court's Rule 17 makes it clear that a conflict between a court of appeals decision and a district court decision in another circuit is not considered to be a conflict between the circuits. The fact that the district court decision was written by a judge now on a court of appeals does not mean that his decision, which has been appealed, will be affirmed by that court of appeals.

Trying another approach at uncovering a "conflict", petitioners come up with what they (and Judge Krupansky) appear to perceive as a conflict between the decision by the Court of Appeals for the Third Circuit in this case and that same court's decision in *In re Amatex Corp.*, 755 F.2d 1034 (3d Cir. 1985) (Pet. 7-8).[4] However, there is no conflict between the two decisions. In *Amatex*, the Third Circuit was considering the means by which potential future claimants might be protected in an ongoing reorganization proceeding governed by the Bankruptcy Code. In this case, the Third Circuit was faced with deciding what effect a reorganization consummated under the now-repealed Bankruptcy Act had

4. In a footnote on page 13 of their petition, petitioners state that they had been informed that a petition for a writ of certiorari would be filed in the *Amatex* case. The deadline for filing such a petition has now passed, and no petition has been filed.

had on potential future claimants. The court in each case expressly avoided saying anything that would present a conflict. In *Amatex*, the court stated that it did "not reach the merits" of the question of whether future claims could be discharged in reorganization proceedings. 755 F.2d at 1041. In this case, the court stated that it was not deciding "what provision in a reorganization plan, if any, could be made for future claims" (Pet. App. 17a n.1).

In any event, a conflict between two decisions of a single court of appeals is something that is appropriately handled by that court itself through its in banc procedure. In this case, a petition for rehearing in banc was submitted to the judges who participated in the unanimous decision below and to all of the other available judges of the circuit in regular active service, including the Honorable Arlin M. Adams (who authored the *Amatex* opinion) and the Honorable Collins J. Seitz (who was the author of the opinion below and also a member of the unanimous *Amatex* panel). Rehearing in banc was denied without dissent on April 26, 1985 (Pet. 60a-61a). Rehearing in banc was also denied in *Amatex* (on April 2, 1985).

Petitioners' strained effort at presenting "conflict" as a ground for review is unavailing.

D. There Is No Conflict with Any Decision of This Court.

The decision below does not conflict with any decision of this Court.

Petitioners cite two opinions of this Court, which they assert stand for the proposition that a bankruptcy court has the power to deal with a potential future claim at a time before the claim has technically "arisen" under the underlying substantive law (Pet. 9). However, neither of the cases cited by petitioners involved a tort claim; the cases involved claims based upon contracts in which, in contrast to this case, the identity of the claimants and

the nature and amount of their potential claims were easily ascertainable. This distinction makes the cases cited by petitioners inapplicable.

Both *Maynard v. Elliott*, 283 U.S. 273 (1931), and *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 849 (1915), involved the question of what constituted a provable contract claim under Section 63 of the Bankruptcy Act. In *Maynard*, the Court held that holders of promissory notes endorsed by the bankrupts had claims that were provable in the bankruptcy proceedings even though the promissory notes were not yet due when the bankruptcy petitions were filed. In *Williams*, the Court held that a surety had a provable claim when it had entered into a contract of indemnity with the bankrupts and knew the amount of payment demanded under the contract but had not yet made the indemnity payment when the bankrupts filed their petitions in bankruptcy. These cases neither conflict with nor undermine the validity of the Third Circuit's decision in this case.

Nor does the Third Circuit's decision conflict with the decisions of this Court interpreting Section 77 of the Bankruptcy Act that petitioners cite. In *Gardner v. New Jersey*, 329 U.S. 565 (1947), the Court held that a court presiding over the reorganization of a railroad under Section 77 has jurisdiction over tax claims asserted against the railroad by a state and that the reorganization court has jurisdiction over all the debtor railroad's property, including property against which a state has asserted a lien for delinquent taxes. In *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway*, 294 U.S. 648 (1935), the Court held that the reorganization court can enjoin a note holder's sale of a railroad's property that has been pledged as collateral under notes containing a provision that authorizes the note holder to sell the property in the event of default if such

a sale could prevent the consummation of a plan of reorganization by the railroad. Both *Gardner* and *Continental Illinois* involved the equitable powers of the reorganization court in ongoing proceedings under Section 77. Neither opinion contains any statement that deals with, much less conflicts with, the ruling of the Court of Appeals in this case.[5]

E. The Decision of the Court of Appeals Is Correct.

Finally, this case was correctly decided by the Court of Appeals for the Third Circuit. The issue that the Court of Appeals had to address was whether, in dealing with reorganization proceedings under Section 77 of the now-repealed Bankruptcy Act in which (1) the reorganization court did not deal with potential claims for asbestos-related injuries that were not yet manifest, (2) no notice had been given to any of the potential claimants that their claims might be barred, and (3) the language of the discharge order did not specifically mention such claims, such claims should be deemed to have been discharged.

There were serious questions of due process. As the Court of Appeals pointed out, "the general rule is that all known creditors must receive personal notice" which would mean that "in our case, every employee who had worked near asbestos and whose address was known would be a known creditor; yet none received personal notice in the prior reorganization proceedings" (Pet. App. 17a). The Court of Appeals avoided "such thorny Constitutional issues" by making a fundamentally sound

5. Petitioners' related suggestion (Pet. 20-21), not raised below, that *Railway Labor Executives Ass'n v. Gibbons*, 455 U.S. 457, 468 (1982), could support a holding that F.E.L.A. actions cannot be asserted against Reading and CJI since they are no longer common carriers is groundless. Reading and CJI were common carriers when they allegedly negligently exposed their employees to asbestos. *See* 45 U.S.C. §51.

tort law decision, a decision that is fully supported by this Court's opinion in *Urie v. Thompson*, 337 U.S. 163 (1949).

The Court of Appeals held that an action for asbestos-related injury does not exist under F.E.L.A. before manifestation of the injury. In making that determination, the Court pointed out:

> If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do. Requiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered. Therefore we hold that, as a matter of federal law, F.E.L.A. actions for asbestos-related injury do not exist before manifestation of injury. (Pet. App. 13a-14a)

Petitioners do not, and cannot, quarrel with either the logic or the soundness of that analysis. Indeed, they do not even address it. Rather, what petitioners seem to be saying is that, even though plaintiffs would not have been able to assert claims under F.E.L.A. at the time of reorganization, those claims nevertheless should be considered to have been barred by a reorganization plan that did not provide for them, solely because they conceivably can be characterized as "other interests of whatever character" as that term was used in Section 77(b) of the Bankruptcy Act. Putting to one side that petitioners are seeking to benefit from having made no provision for

plaintiffs' claims during their reorganizations and the total callousness of the attitude that petitioners manifest towards their former employees — who have contracted illnesses because of exposure to asbestos during their work for petitioners — it is obvious that the Third Circuit's analysis of the law is correct. As the Court of Appeals pointed out in its decision, "before one can have an 'interest' which is cognizable as a contingent claim under Section 77, one must have a legal relationship relevant to the purported interest from which that interest may flow" (Pet. App. 15a).

> There is no legal relationship, however, between a tortfeasor and a tort victim until a tort actually has occurred. The tortfeasor-victim legal relationship arises simultaneously with the cause of action in tort. Since we have said that there is no tort under F.E.L.A. until injury manifests itself, it follows that there was no legal relationship between plaintiffs and defendants relevant to plaintiffs' future causes of action in tort from which an 'interest' could flow. (Pet. App. 15a)

The decision below is sound as a matter of logic and as a matter of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF THE PENN CENTRAL CORPORATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF IN SUPPORT OF THE PETITION OF READING COMPANY AND CENTRAL JERSEY INDUSTRIES, INC. FOR A WRIT OF CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Penn Central Corporation ("PCC"), by its attorneys, respectfully moves the Court for leave to file the accompanying brief as *amicus curiae* in support of the joint petition of Reading Company and Central Jersey Industries, Inc. ("Petitioners") for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir. 1985) ("*Schweitzer*"). PCC files this motion because counsel for Respondents Josephine Schweitzer, *et al.* and Consolidated Rail Corporation have refused to consent to the filing of a brief by PCC. For the reasons set forth below, we respectfully urge the Court to grant PCC's motion.

The petition presents fundamental and important issues concerning the power of Federal Bankruptcy Courts to treat and discharge the injury claims of persons based on exposure to asbestos (and other similar substances) prior to consummation of a reorganization under Section 77 of the Bankruptcy Act, former 11 U.S.C. § 205 (repealed), but not manifesting themselves until after consummation. The judgment in the *Schweitzer* case, which Petitioners seek to review in this Court, reversed decisions by two district courts, in the U.S. District Court for the Eastern District of Pennsylvania and in the U.S. District Court for the District of New Jersey, which held that personal injury claims asserted after the consummations of the Section 77 reorganizations of Reading Company ("Reading") and The Central Railroad Company of New Jersey, premised on exposure to asbestos on the part of former railroad employees, were discharged in their respective reorganizations. The Third Circuit's determination in *Schweitzer*, in our view, conflicts with established precedent concerning the scope of dischargeable claims in, and the clear statutory purposes of, reorganization under Section 77. The Court of Appeals' decision also has implications for reorganizations under the Bankruptcy Reform Act of 1978, 11 U.S.C. § 101, *et seq*. If the decision below is accepted, judicial power to deal with tort claims based on alleged injury-causing exposure to asbestos prior to consummation will be unnecessarily restricted and the ability of the courts to fashion final reorganization plans upon which creditors and debtors may rely may be substantially impaired.

The decision of the Court of Appeals in *Schweitzer* arose against the backdrop of the massive reorganization of the former Penn Central Transportation Company ("PCTC") and other Northeastern rail carriers. The eight-year PCTC reorganization under Section 77 of the Bankruptcy Act, from which PCC emerged in 1978, was an extraordinarily complex proceeding which resulted in a plan of reorganization that served as a model for others, including Petitioners. The reorganization was not only monumental in its complexities, but unusual because of the intervention of federal remedial legislation. In

early 1974, the Regional Rail Reorganization Act of 1973 ("Rail Act"), which amended Section 77 particularly with respect to the role of the Interstate Commerce Commission, became effective. Pursuant to the Rail Act, effective April 1, 1976, virtually the entire PCTC rail system, including rolling stock, employees, and books and records, was conveyed to a new entity, Consolidated Rail Corporation, and the remaining retained assets were either liquidated or included as part of a plan of reorganization. Thereafter, in 1977, the many thousands of creditors who participated in the PCTC reorganization proceedings voted for a final reorganization plan, which was also reviewed and approved by the federal courts. *In re Penn Central Transp. Co.*, 458 F.Supp. 1234 (E.D.Pa. 1978), *aff'd in part, remanded in part*, 596 F.2d 1107 (3d Cir. 1979). Notwithstanding the implementation of the Consummation Order and Final Decree in the PCTC reorganization on October 24, 1978, when PCTC received a general discharge of claims, PCC has been named as a defendant in by far the largest number of asbestos-related personal injury claims brought by ex-railroad employees. It is currently defending more than 250 such civil actions, which are pending in various state and federal courts. It is expected that many more such actions are likely to be filed in the future.

PCC submits that the deleterious impact of the decision below is best understood in light of the harm it works to the complex and intricate creditor compromises necessarily made to achieve the final PCTC plan. In its eight-year reorganization, creditors, PCTC as debtor and the various secondary debtors made a host of critical compromises of debts, claims and obligations involving billions of dollars to arrive at an acceptable final plan which covered the claims and interests of all creditors—including a vast number of personal injury claimants. The PCTC plan and the compromises on which it was built were the basis for the entry by the PCTC reorganization court of the Consummation Order discharging PCTC. The decision below, however, effectively undercuts those compromises by permitting the assertion, years after consumma-

tion, of multimillion dollar tort claims which creditors had no reasonable expectation would be lodged against the reorganized company. Because PCTC's reorganization was clearly the most involved of those of the Northeast carriers and because PCTC is a party to the largest number of pending actions affected by the *Schweitzer* decision, PCC believes that its position in this respect is very different from that of other parties hereto, and is perhaps unique. We respectfully ask the Court to grant PCC's motion so that it may benefit from PCC's valuable perspective in this case.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether a reorganization court has the power to deal with and provide for latent future asbestos-related toxic claims as part of a reorganization of a debtor corporation under Section 77 of the Bankruptcy Act?

2. Whether, assuming that a reorganization court has such authority, the court may bar such future claims, where the rail operations out of which such claims arose are, during the course of the reorganization, transferred to a solvent successor railroad?

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BRIEF OF THE PENN CENTRAL CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE

The Penn Central Corporation ("PCC") submits this brief, as *amicus curiae*, in support of the petition of Reading Company ("Reading") and Central Jersey Industries, Inc. ("CJI") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 29, 1985 (the "Petition").

PCC is the corporate entity which emerged from the much publicized reorganization of Penn Central Transportation Company ("PCTC") on October 24, 1978, under Section 77 of the Bankruptcy Act of 1898 (the "Bankruptcy Act"), formerly codified at 11 U.S.C. § 205. PCTC's economic demise, which

began after World War II, was basically caused by the railroad's inability to control the costs of freight and passenger service and to secure adequate revenues for those services. By June of 1970, losses from the railroad functions had mounted to about $1 million per day and PCTC was unable to meet its debts as they became due. So, on June 21, 1970, PCTC petitioned the United States District Court for the Eastern District of Pennsylvania to begin a process of reorganization that would not only effect the largest and most complex reorganization under Section 77, but also serve as a model for the reorganization of the other former bankrupt Northeast railroads, including the Petitioners. PCTC's petition was thereafter granted and reorganization proceedings were held under the supervision of District Court Judge John P. Fullam, until Order No. 3708, the Consummation Order and Final Decree dated August 17, 1978, became effective on October 24, 1978 and formally consummated the Plan of Reorganization. *See*, *In re Penn Central Transp. Co.*, 458 F.Supp. 1234 (E.D.Pa. 1978), *affirmed in part, remanded in part*, 596 F.2d 1102, 1127, 1154, 1155 (3d Cir. 1979), *cert. denied*, 444 U.S. 834, 835 (1979).

As was the case with the railroad predecessors of Reading and CJI, congressional legislation in the 1970's played a prominent and rather unique role in the PCTC reorganization by providing for the divestiture by PCTC of its rail assets and rail-related functions and for their transfer to Consolidated Rail Corporation ("Conrail") on April 1, 1976. Under the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701-93 ("Rail Act") and the Final System Plan promulgated by the United States Railway Association pursuant thereto, the Reorganization Trustees for PCTC, effective April 1, 1976, ceased all rail operations and conveyed to Conrail and other railroads virtually the entire railroad organization, including all railroad employees, track, rolling stock, records, plant and equipment. After conveyance of the PCTC railroad organization to Conrail, the Reorganization Trustees for PCTC submitted an amended Plan of Reorganization to the PCTC Reorganization

Court. The Plan provided for the treatment of the many thousands of claims and interests of PCTC's creditors, claimants and stockholders and for the establishment of a viable reorganized company, free of the entangling financial obligations arising out of PCTC's then-defunct railroad business, including a great number of personal injury tort claims. The Plan, which was formulated only by reason of the willingness of such creditors and the debtor to compromise claims, debts and obligations involving billions of dollars, received a favorable vote of PCTC's creditors, and was approved by the Reorganization Court and the United States Court of Appeals for the Third Circuit. *See, In re Penn Central Transp. Co.*, 458 F.Supp. 1234 (E.D.Pa. 1978), *aff'd in part, remanded in part*, 596 F.2d 1102 (3d Cir. 1979). Since the consummation of the PCTC reorganization on October 24, 1978, when PCTC received a general discharge of claims and was authorized to issue new securities, PCC has not engaged in any railroad activities. PCC currently manufactures products and supplies services through subsidiaries, primarily in the areas of energy and natural resources, and electronics, defense and telecommunications.

PCC has a direct and immediate interest in the issues raised by the Petition. In its reorganization, PCTC used comprehensive and orderly procedures to quantify claims and interests of all kinds. The final PCTC Plan fairly provided for all such interests, including personal injury claims which, under the Plan, were paid in cash. As of March 1978, personal injury claims totalled $173 million, of which $8.2 million had already been satisfied. Since 1981, however, PCC and its wholly-owned subsidiaries have been named as defendants in some 250 actions filed nationwide by plaintiffs or representatives of plaintiffs, who were employees of PCTC or its wholly-owned subsidiaries prior to April 1, 1976. And more such actions are expected to be filed. These plaintiffs seek to recover damages for injuries allegedly related to asbestos exposure during their railroad employment. Their claims, which are premised upon, *inter alia*, the Federal Employer's Liability Act, 45 U.S.C.

§ 51, *et seq.* ("FELA"), and the Boiler Inspection Act, 45 U.S.C. § 22, *et seq.*, are generally similar to those now pending against Reading and CJI. These 250 actions constitute the vast majority of all asbestos-related occupational disease actions brought by ex-railroad employees against the reorganized Northeast railroad carriers.

The decision of the Court of Appeals below thus has a demonstrable adverse impact on PCC in the more than 250 cases in which it is a party. At the same time, the decision below effectively undermines the premises of PCTC's consummated reorganization carried out in conformity with the statutory provisions and congressional policies reflected in Section 77. Further, it may substantially impede the ability of the federal courts now and in the future to implement final and equitable plans of reorganization with respect to claims of persons asserting injuries based on exposure to asbestos and other allegedly toxic substances.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 758 F.2d 936 and is reproduced in the Appendix to the Petition (Pet. App. at 1a-18a). The opinion of the district court in the Reading cases is reported at 36 Bankr. 469 and is reproduced in the Appendix to the Petition (Pet. App. at 19a-26a). The opinion of the district court in the CJI cases is reported at 38 Bankr. 686 and is reproduced in the Appendix to the Petition (Pet. App. at 38a-44a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1985 and is reproduced in the Appendix to the Petition (Pet. App. at 53a-59a). A petition for rehearing in the CJI cases was denied on April 26, 1985 (Pet. App. at 60a-61a). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The statutes involved in this case are Sections 77(b)(3) and 77(f) of the Bankruptcy Act, former Sections 11 U.S.C. §§ 205(b)(3) and 205(f), and Sections 101(4) and 1109(b) of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 101, *et seq.* (1982) (the "Code"), relevant portions of which are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

Reading and The Central Railroad Company of New Jersey (subsequently reorganized as CJI) were common carriers by railroad and two of the major railroads in the Northeast that sought relief under the bankruptcy laws in the late 1960's and early 1970's. Reading filed a petition for reorganization under Section 77 of the Bankruptcy Act on November 23, 1971; The Central Railroad Company of New Jersey ("CNJ") filed its petition on March 22, 1967. While Petitioners were in the process of reorganization, Congress enacted the Rail Act to preserve a Northeastern rail transport system in the wake of the grave financial crisis brought about by the bankruptcies of the major railroads in the region, including PCTC. The Rail Act amended various provisions of Section 77, particularly those relating to the role of the Interstate Commerce Commission, and provided for a transfer of essential rail assets of those carriers to a new entity, Conrail, which was formed in 1974. The Rail Act also provided for the liquidation or reorganization of the remaining assets of the Northeast railroads, which, because of their economic plight, were unable to effect reorganizations as railroads on an income basis under Section 77 of the Bankruptcy Act.

The Rail Act procedure required a court determination that the debtor railroad was incapable of an income-based reorganization, and after that determination, a divestiture by the debtor of all rail-related property and interests and the convey-

ance of those properties and interests to Conrail. After conveyance of all of the specified rail properties and interests to Conrail, the debtor railroad either liquidated its remaining assets or adopted a plan of statutory reorganization to benefit creditors and to enable the reorganized company to achieve the statutory goal of a fresh start.

Judge J. William Ditter, Jr. of the U.S. District Court for the Eastern District of Pennsylvania presided over Reading's reorganization. After the Rail Act became effective, Judge Ditter made the appropriate analysis of the propects for an income-based reorganization and determined that Reading could not successfully be reorganized as a railroad. Consequently, under the Rail Act, Reading conveyed all of its rail properties and interests to Conrail effective April 1, 1976, and on that date ceased to be an operating railroad. The properties and interests so conveyed included the real estate comprising the Reading rail system, all designated rail assets, track and other track materials, books and records, including employee records, furniture, supplies and equipment, and all cash and other current assets. As required by the Rail Act, Conrail offered employment to all former active Reading employees. The only assets retained by Reading after conveyance to Conrail were certain non-rail properties, a trucking company, some marine equipment, other investments, a claim against Conrail and the United States for the value of the assets that were transferred, and its federal income tax net operating loss carry-forwards.

Thereafter, the Reading Trustees prepared and submitted a plan of reorganization with respect to Reading's remaining assets (the "Plan"). The final version of the Plan was presented to Judge Ditter by the Trustees on June 25, 1979. The Plan was fashioned after the plan approved in the PCTC reorganization proceedings and was structured to preserve one of Reading's principal assets, the federal income tax loss carry-forwards.

Reading's Plan was approved by Judge Ditter on May 21, 1980 and confirmed on September 25, 1980, after a vote of Reading's creditors. Pursuant to Order No. 2004 of the Read-

ing Reorganization Court (the "Reading Consummation Order"), the Plan was consummated on January 1, 1981. In accordance with the Reading Consummation Order, the books and accounts of the former Reading Company were closed at 11:59 p.m. E.S.T. on December 31, 1980, and the books and accounts of the reorganized Reading Company were opened at 12:00 a.m., E.S.T. on January 1, 1981. That order also provided that the assets of the former Reading Company were transferred to the reorganized Reading free and clear of any and all claims of the former Reading Company, its creditors, claimants and stockholders. The Reading Consummation Order further provided that the former Reading Company and its Trustees were discharged and released forever from any and all claims.

Chief Judge Clarkson F. Fisher of the U.S. District Court for the District of New Jersey presided over CNJ's reorganization. Like Reading, CNJ conveyed all of its rail properties and interests to Conrail under the Rail Act, effective April 1, 1976, and on that date ceased to be an operating railroad. Thereafter, the CNJ Trustee prepared and submitted a plan of reorganization with respect to CNJ's remaining assets (the "CNJ Plan") and pursuant to Order No. 965 filed on September 13, 1979, the CNJ reorganization was consummated on September 14, 1979. In accordance with Order No. 965, the CNJ Consummation Order, the assets of the former CNJ were transferred to the reorganized company, CJI, free and clear of any and all claims of the former CNJ, its creditors, claimants and stockholders. Further, the CNJ Consummation Order provided that the former CNJ and its Trustee were discharged and released forever from any and all claims.

After consummation of the Reading and CNJ Plans, several former Reading and CNJ railroad employees and representatives and survivors of former Reading and CNJ railroad employees commenced personal injury actions against Conrail, CJI and Reading asserting claims under the FELA and related statutes. The plaintiffs in those actions seek to recover for injuries allegedly related to the railroad employees' exposure to

asbestos, which became manifest after the transfer of the rail assets by Reading and CNJ to Conrail and after the effective dates of the Reading and CNJ consummation orders.

Reading moved to dismiss each of the cases against it on the ground that the plaintiffs are barred by its Consummation Order or otherwise from asserting their claims against the reorganized Reading. Plaintiffs and Conrail opposed Reading's motions. The various FELA and related actions were then transferred to District Judge Ditter for purposes of deciding the several motions to dismiss. In an opinion and order dated January 10, 1984, Judge Ditter granted Reading's motions, ruling that the plaintiffs' claims were discharged in the reorganization proceedings, and transferred the cases back to the various judges to whom they had been assigned originally (Pet. App. at 19a-26a). Those judges determined that Judge Ditter's order was a final decision as to Reading's rights and liabilities and that there was no just reason to delay entering judgment in Reading's favor, and accordingly entered final judgments under Federal Rule of Civil Procedure 54(b).

CJI was also sued under FELA and related statutes following its reorganization by a number of former CNJ employees and obtained an injunction against the prosecution of such suits from its reorganization court on the ground that the claims were barred by its Consummation Order and had been discharged in the reorganization proceedings (Pet. App. at 38a).

The Reading and CJI plaintiffs and Conrail perfected appeals to the United States Court of Appeals for the Third Circuit, which were consolidated. The Court of Appeals, in a decision of apparent first impression, reversed the judgments of the district courts and remanded the various cases for further proceedings. The court held as a matter of federal law that "F.E.L.A. actions for asbestos-related injury do not exist before manifestation of injury." (Pet. App. at 14a).

Based on the conclusion that the plaintiffs' causes of action did not exist until after the date on which the debtors' Section

77 reorganizations were consummated, the Court of Appeals ruled that the Reading and CNJ reorganization courts could not discharge plaintiffs' claims because they were not "claims" as defined by Section 77. The court below rejected the argument that the expansive language of Section 77(b)(3), which provides that "claims" include "interests of whatever character," encompasses a creditor's contingent asbestos-related FELA claim under the Bankruptcy Act, when the claimant has no technical present cause of action against the debtor. The court also determined that plaintiffs, who were long-time railroad employees during the period of their alleged workplace exposure to asbestos and subject to the protection of FELA, had no sufficient legal relationship with their employers on which such a statutory Section 77(b) "interest" may be premised.

On June 16, 1985, Circuit Judge Robert B. Krupansky, who presided over the reorganization of Erie Lackawanna before his elevation to the U.S. Court of Appeals for the Sixth Circuit and who continues to do so, issued an order expressly declining to follow the decision of the court below. Circuit Judge Krupansky held that "the discharge [of Erie Lackawanna] under Section 77 of the Bankruptcy Act is an absolute bar to the post confirmation [FELA and other] claims asserted herein." (Pet. App. at 87a-88a).

SUMMARY OF ARGUMENT

The Third Circuit has adopted an overly restrictive rule that the personal injury damage claims of former railroad employees based on exposure to asbestos prior to consummation of a reorganization under Section 77 of the Bankruptcy Act cannot be discharged in such proceedings because the employees lacked a technical cause of action during reorganization. Decisions of this Court and the lower courts have established that bankruptcy reorganizations under Section 77 are designed to maximize the value of the estate for the benefit of creditors

and to foster and promote the adoption of reorganization plans that deal with creditor claims with equity and finality. *See, Commodity Futures Trading Comm'n v. Weintraub*, ____ U.S. ____, 105 S.Ct. 1986, 1993 (1985); *Duryee v. Erie Railroad Company*, 175 F.2d 58, 63 (6th Cir.), *cert. denied*, 378 U.S. 861 (1949); *Van Schaick v. McCarthy*, 116 F.2d 987, 992 (10th Cir. 1941). To this end, Congress incorporated into Section 77 a broad and expansive definition of dischargeable claims to include contingent claims and other interests of whatever character. *Gardner v. New Jersey*, 329 U.S. 565, 573 (1947); 5 Collier on Bankruptcy § 77.20 at 602-03 (14th ed. 1978). The decision below is at war with these purposes of reorganization and with the broad interpretation of the meaning of dischargeable claims that Congress plainly intended under Section 77. Further, the decision below is in direct conflict with well-reasoned precedent within the Sixth Circuit, which holds that tort claims of former railroad employees allegedly injured by exposure to asbestos before the consummation of the Erie Lackawanna reorganization are "claims" within the meaning of Section 77(b) and may be finally discharged precisely because of the sweeping meaning of the term "claims" under Section 77 and because a broad general discharge is necessary to effectuate Section 77's congressional purposes. *In re Erie Lackawanna Railway Co.*, No. B 72-2838 (N.D. Ohio June 18, 1985) (Pet. App. at 68a-69a, 72a-79a).

The unreasonable rule of the Third Circuit also does violence to the now consummated reorganizations of PCTC and other Northeast railroads. Those reorganizations were achieved through a complex and intricate process requiring critical compromises of debts, claims and obligations involving billions of dollars by creditors of the bankrupt railroads; without them, they could not successfully have been completed. Those creditor compromises, particularly in the case of the PCTC reorganization, were grounded on the assumption that a reorganization plan approved by creditors and the court would be final, and that the reorganized company would not be saddled with tort claims of the kind asserted by plaintiffs

below, seeking tens of millions of dollars in damages, that would undercut the utility of pre-plan compromises and erode the value of securities and other consideration transferred when the reorganizations were consummated.

Similarly, the restrictive approach the Court of Appeals has taken with respect to the bankruptcy power of the federal courts threatens to impede the ability of reorganization courts to confirm final reorganization plans upon which creditors, debtors and the reorganized entities alike may reasonably rely. Without power to dispose of and discharge the broadest range of claims authorized by Congress under Section 77, current and future efforts to reorganize failing concerns under the Code likely will be severely frustrated, and the ordinary difficulties encountered in the reorganization process will be compounded by uncertainties as a result of the decision below. In such circumstances, debtors and the federal courts may be impelled to resort to liquidation, rather than reorganization, in which estate values will not be maximized for the benefit of all creditors as intended by Congress. Accordingly, the unsound rule of the Third Circuit should be overturned.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THE CONGRESSIONAL AIMS OF SECTION 77 REORGANIZATION AND UNDERMINES ESSENTIAL COMPROMISES WHICH WERE NECESSARILY MADE TO ACHIEVE VIABLE PLANS TO REORGANIZE THE NORTHEAST RAILROADS.

The reorganization of PCTC, Reading, CNJ and other Northeast rail carriers in little more than a decade was a major accomplishment achieved through a dynamic process guided by the statutory framework created by Congress in the Bankruptcy Act and the Rail Act. The success or failure of this

process, in turn, depended upon the ability of creditors and debtors, with the aid of federal courts, to arrive at crucial and intricate compromises of a multitude of debts, claims and obligations involving billions of dollars. The Court of Appeals' opinion, however, in an instant, undercuts the utility of those many compromises that were founded on the legitimate and reasonable expectations that the railroads' pre-consummation claims would be finally discharged and the reorganized entities would begin their existences with an asset base unencumbered by the spectre of future multimillion dollar tort claims.

Reorganizations under Section 77 seek to effectuate the bankruptcy goal of "maximizing the value of the estate" for the benefit of creditors. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 584 (1935). As one of their main purposes, they aim to rehabilitate "the debtor by a readjustment of its financial structure in the interest of the debtor and its creditors and security holders, under a fair and equitable plan of reorganization which shall so modify or alter the rights of both secured and unsecured creditors that the fixed charges shall be brought within the probable future earnings available for the payment thereof." *Van Schaick v. McCarthy*, 116 F.2d 987, 992 (10th Cir. 1941). *Accord*, *Connecticut Ry. and Lighting Co. v. Palmer*, 305 U.S. 493, 501 (1939). To this end, Congress gave to Section 77 reorganization courts power to affect and dispose of claims of creditors which this Court has described as "sweeping" and "all-inclusive." *Gardner v. New Jersey*, 329 U.S. 565, 573, 575-76 (1947). Further, as in all such reorganizations, debtors, creditors and the courts work toward approval of a final plan, a key part of which involves "the discharge of all demands of whatever sort, executory and contingent, presently due or to mature in the future." *City Bank Farmers Trust Co. v. Irving Trust Co.*, 299 U.S. 433, 438-39 (1937).

Achieving those congressional purposes, however, required creditors and the debtors to reach essential compromises with respect to defined classes of claims and a great variety of thorny issues before plans could be approved and confirmed.

The PCTC Reorganization Court initiated this process in 1970 by directing the establishment of comprehensive and fair procedures designed to delimit a universe of claims. By Order No. 164 entered on February 17, 1971, the PCTC Reorganization Court established its Proofs of Claim program and generally required claimants with pre-petition claims to file formal written claims on or before June 1, 1971. Pursuant to that order, the PCTC Trustees notified more than 45,000 potential creditors, virtually all of which filed timely claims which were liquidated in the Proofs of Claim Program. Later, in Order No. 914 entered on September 12, 1972, the PCTC Reorganization Court adopted a procedure to accommodate the filing of tens of thousands of late claims. A similar process was utilized to identify and quantify the myriad claims of persons and entities having post-petition, secured and other types of claims against PCTC.

In 1977, a comprehensive reorganization plan was presented to creditors with due notice and was approved by the Reorganization Court. Overall, the Plan equitably provided for literally thousands of claims falling into fifteen different classes, the total value of which exceeded $3 billion. Late claims filed during the reorganization were also accounted for in the process.[1]

As a result, the approved PCTC Plan was expressly designed to cover all possible claims and interests which had been or might be asserted against the debtor or the Trustees and to dispose of them in accordance with the provisions of the Plan with finality. Section 3.3 of the Plan, for example, specifically

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1 Under Section 10.3 of the PCTC Plan, the reorganized company had to estimate, as of the consummation date (October 24, 1978) the value of unliquidated claims and to reserve securities to satisfy those claims when they were liquidated. The prospect that claims such as those of the approximately 250 FELA occupational disease plaintiffs—for possibly tens of millions of dollars in the aggregate—would be first asserted years after consummation against the reorganized entity in prejudice to the interests of claimants and creditors whose timely asserted claims are concededly within the ambit of the Plan, was *not* before creditors who voted on the Plan.

stated that "[a]ll obligations incurred by the Trustees and all obligations of and claims against Debtor that are outstanding as of the Consummation Date and not otherwise provided for in this Plan, will, unless the Court directs otherwise, be discharged." Section 11.1 of the Plan in similar fashion called for the broadest disposition of possible claims and interests by its provision that "[t]he property dealt with by the Plan, when vested in the Reorganized Company. . . will be free and clear of all claims of the Debtor, its creditors and Stockholder and all other persons, unless specifically provided in the Plan, and the Debtor will be discharged from its debts and liabilities."[2] Such provisions reflected the justifiable belief on the part of creditors and the debtors that plans made pursuant to Section 77's dictates were final and that value received in the form of securities and other consideration could not be diminished or lost as a result of later asserted claims which had an essential relation or nexus with the debtor's pre-consummation rail operations. *See, Duryee v. Erie Railroad Company*, 175 F.2d 58, 63 (6th Cir. 1949), *cert. denied*, 338 U.S. 861 (1949).

None of these beneficial plan provisions in the PCTC (or Reading or CNJ) Plans, however, could have been adopted or implemented without essential creditor compromises. As the Third Circuit pointed out in *In re Penn Central Transp. Co.*, 596 F.2d 1127, 1129 (3d Cir. 1979), the PCTC reorganization culminated in a "monumental plan designed to resolve the most complex set of interrelated and conflicting claims ever addressed under Section 77 of the Bankruptcy Act, 11 U.S.C. § 205." The nature of the compromises which were necessary to arrive at a final PCTC Plan were likewise monumental because of the existence of a wide range of issues that remained

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2 This is, of course, precisely the result intended by Section 77(f), formerly 11 U.S.C. § 205(f), which provided that:

> "The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities."

to be litigated. They included, for example, disputes over the priority of governmental claims, state, local and federal; the validity of a pledge agreement involving a major PCTC subsidiary; a broad range of issues relating to the coverages of mortgages; and difficult questions concerning the intricate relationships between PCTC and a number of companies which were secondary debtors in its reorganization. *See, In re Penn Central Transp. Co.*, 458 F.Supp. at 1263.

Fortunately, important and critical compromises on these issues were reached so that the PCTC reorganization could be concluded. As Judge Fullam explained at the time the PCTC Plan was approved:

> "The Plan now before the Court incorporates a host of compromises of various kinds. They include actual compromise settlement agreements; provisions of the Plan which carry out what the Trustees regard as a fair and reasonable adjustment of unresolved disputes; and underlying assumptions, concerning such matters as the Valuation Case, based upon judgements which have been arrived at through a process closely akin to compromise. The agreed-upon or proposed compromise settlements include disputes between the Trustees and particular claimants or classes of claimants regarding the amount or nature of the claims, and disputes between classes of creditors."
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> "While each compromise settlement, compromise proposal and compromise-type assumption must be evaluated individually, the importance of viewing the Plan as a cohesive unit cannot be over-emphasized. All of the compromises are closely interrelated. In a very real sense, the Plan is the sum of all of its compromises. The fairness and equity of the treatment accorded to any class or member thereof must be evaluated in the context of the Plan as a whole." *In re Penn Central Transp. Co.*, 458 F.Supp. at 1262.

Absent these bargained-for compromises, PCTC (and the other debtors) may well have been forced into liquidation in a process that at the same time would deprive creditors of the value of PCTC's federal income tax loss carry-forwards which by 1975 had reached $1.8 billion. *In re Penn Central Transp. Co.*, 596 F.2d 1127, 1138 (3d Cir. 1979). By having PCC operate within the ambit of the corporate charter and corporate shell of the discharged and reorganized PCTC, these tax loss carry-forwards were saved thereby maximizing the assets available for distribution and making possible the negotiated compromise resolution of all conflicting claims and the prompt closing of the reorganization proceedings.

The restrictive decision below disregards the fundamental congressional purposes of Section 77 reorganization and the need (and power) of the courts to implement final plans built on critical creditor compromises of the kind made in the PCTC reorganization and is without any reasoned support. The appellate court grounded its result upon whether the tort plaintiffs were the holders of "claims" or "interests" which were dischargeable by the applicable Consummation Orders of the Section 77 debtors. In ruling that the Reading and CJI FELA plaintiffs did not have "claims" which were discharged by the terms the Reading and CNJ consummation orders, the court below referred to the language of Section 77(b)(3), but failed to accord meaning to its broad sweep, which includes in the term "claims" all "debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." 11 U.S.C. § 205(b)(3). Based on the plain meaning of this expansive language alone, it seems clear that the court below should have found that plaintiffs had an "interest" in the Reading and CJI reorganization. *Gardner v. New Jersey*, 329 U.S. 565, 573, 575-76 (1947). See, 5 Collier on Bankruptcy, § 77.20 at 602-03, (14th ed. 1978).[3] This Court, moreover,

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3 In the context of these tort claims, such a holding would hardly have deprived the plaintiffs below of any recovery. Wholly apart from the plethora of companies which manufactured asbestos or sold products

(Footnote continued on following page)

recently cautioned against giving a limiting meaning to the scope of a dischargeable claim in bankruptcy when Congress has deliberately opted for a broad one. *See, Ohio v. William V. Kovacs, d.b.a. B&W Enterprises, Inc.*, ____ U.S. ____, 105 S.Ct. 705, 708-09 (1985).

Similarly, the Court of Appeals' flawed analysis did not consider the tort claims as "contingent" claims, even though under Section 77(b)(3), claims may include interests which had not yet technically ripened into a legally enforceable right to payment or cause of action against the debtor. *See, e.g., Maynard v. Elliott*, 283 U.S. 273 (1930), *Williams v. United States Fidelity and Guaranty Co.*, 236 U.S. 549 (1915). In this connection, the appellate court purported to distinguish *In re Radio-Keith-Orpheum Corporation*, 106 F.2d 22 (2d Cir. 1939). In that case, landlords who had leased property to one of the debtor's subsidiaries and received a guarantee by the debtor that the rent would be paid, were held to have had those guarantees affected by the debtor's bankruptcy proceedings. Notwithstanding that holding, the Third Circuit reasoned that contingent claimants and holders of "interests" which participate in a reorganization are narrowly confined to those who demonstrate a pre-existing "legal relationship relevant to the purported interest from which that interest may flow." (Pet. App. at 15a-16a). Even were the lower court's decision in this regard otherwise supportable in light of the broad scope of a "claim," it ignores the fact that these plaintiffs had ongoing employer-employee relationships with PCTC, Reading and CNJ for many years before the Northeast railroad reorganizations even began, and that this relationship was within the explicit statutory purview of FELA. And it is out of those relationships that the allegedly unsafe working conditions which are the basis of the present tort claims grew. *See, In re Erie Lackawanna Railway Co.*, Civil No. B 72-2838 (N.D. Ohio June 18, 1985). (Pet. App. at 74a).

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containing asbestos to the railroads, the true successor to the Northeast railroads which were reorganized under Section 77, namely Conrail, still exists as a viable railroad and potential party defendant.

Other authorities on which the court below relied, *Mooney Aircraft Corp. v. Foster (In re Mooney Aircraft, Inc.)*, 730 F.2d 367 (5th Cir. 1984) and *Gladding Corp. v. Forbes (In re Gladding Corp.)*, 20 Bankr. 566 (D. Mass. 1982)), likewise fail to buttress the holding below. In *Gladding* and *Mooney*, the determination of whether the claim was discharged or addressed by the debtors' prior reorganization (in *Mooney*'s case, under Chapter VII of the Bankruptcy Act and in *Gladding*'s case, under Chapter XI of the Bankruptcy Act) was dependent upon whether the claim was "provable" under Section 63(a)(8) of the Bankruptcy Act, 11 U.S.C. § 103(a)(8), which allowed only "contingent debts and contingent contractual liabilities" to be proved and allowed against the estate. In Section 77 reorganizations, on the other hand, the requirement that claims be "provable" under Section 63 of the Bankruptcy Act is, of course, not applicable.[4]

In striking contrast to the decision below, Circuit Judge Robert Krupansky, sitting by designation in the U.S. District Court for the Northern District of Ohio recently held in *In re Erie Lackawanna Railway Company, supra* (Pet. App. at 62a-88a) that the tort claims of former Erie Lackawanna railroad employees based on exposure to asbestos during employment, which were asserted against the reorganized Erie Lackawanna, were absolutely discharged by final orders in the Section 77 proceedings relating to that former railroad carrier. The Circuit Judge in *Erie Lackawanna* carefully analyzed the grounds of the decision of the court below, and concluded, on the basis of the same essential faults in the Third Circuit's reasoning described *supra*, at 16-18, that plaintiffs could not pursue their claims against the reorganized company. The court determined that those plaintiffs failed "to assert their interests which this court qualifies as claims under Section 77 of the

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4 Section 77(b)(2), former 11 U.S.C. § 205(b)(2), expressly provided that the term "creditors" includes "all holders of claims of whatever character against the debtor or its property, *whether or not such claims would otherwise constitute proveable claims under this Act* . . . ." (emphasis added)

Bankruptcy Act, and, therefore, cognizable before consummation of the Plan . . . [and] have lost the opportunity to have those interests evaluated in relation to the many other and competing interests which were asserted during the reorganization." (Pet. App. at 86a).[5] To have concluded otherwise, Judge Krupansky noted, "would have forever destroyed the full faith and credit of the Act by decimating the incentive of certainty and finality upon which debtors, their creditors and security holders of necessity were required to rely and continue to rely under the new Code." (Pet. App. at 68a).

In brief, the Third Circuit fastened on an overly restrictive meaning of the definition of a "claim" under Section 77 when neither the statute, which is intended to foster constitutionally-based federal bankruptcy policies, nor case law, intimates any support for such a constricting approach. The consequences of upholding the appellate court's limiting rule are plain and harsh: complex creditor compromises made in the now consummated reorganizations of the Northeast railroads are undermined; pre-consummation liabilities of the railroad thought to have been disposed of are revived; and expectations upon which investors in the reorganized companies should reasonably rely evanesce. Those are surely not the results Congress intended to flow from the proper exercise of Section 77 bankruptcy powers.

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5 Circuit Judge Krupansky noted, *en passant*, that the Erie Lackawanna Plan, like the PCTC Plan, was the reward of "arduous, exhaustive and comprehensive negotiations and compromises. . . ." (Pet. App. at 63a).

II

THE DECISION BELOW MAY MATERIALLY IMPEDE THE ABILITY OF BANKRUPTCY COURTS TO EFFECT FINAL REORGANIZATIONS UNDER CHAPTER 11 OF THE BANKRUPTCY REFORM ACT OF 1978

The ramifications of the decision below reach beyond having a detrimental impact upon reorganizations already consummated under Section 77. By holding that FELA occupational disease claims manifesting themselves after the consummation of the Section 77 reorganization do not constitute "claims" and cannot be discharged, the Third Circuit's decision may materially impede the completion of the largest and potentially most significant corporate reorganizations taking place under Chapter 11 of the current Bankruptcy Code, 11 U.S.C. § 1101, *et seq.* (1982).[6]

The rising crescendo of asbestos-related toxic tort suits filed has prompted at least three well-known corporate manufacturers of asbestos-related products to file petitions for relief under Chapter 11 of the Code. *In re Johns-Manville Corporation, et al.*, Nos. 82 B 11656-82 B 11676 (Bankr. S.D.N.Y.); *In*

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6 Under Section § 101(4)(A) of the current Code, a "claim" includes a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured . . . ." (emphasis added) Under Section 77(b)(3) of the Act, "claims" include "debts . . . whether liquidated or unliquidated, . . . or other interests of whatever character." Although there is a semantical difference in the definition of "claim" under the old Act and new Code, both definitions are, in all respects pertaining to the issues raised in the Petition, equally broad. Thus, although legislative history does indicate that the definition of "claim" under the new Code was intended to be "even broader . . . than is found in the present debtor rehabilitation chapters," Senate Report No. 95-989, 95th Cong. 2d Sess. at 21-11 (1978), that increased breadth relates mainly to the dispensing of any reliance upon the requirement of "provability" under Section 63 of the old Act (which was explicitly dispensed with in Section 77 reorganizations) and the inclusion in the definition of "claim" under the Code of an equitable right to performance that does not give rise to a "right to payment."

re Amatex Corporation, No. 82-05220K (Bankr. E.D. Pa.); *In re UNR Industries, Inc., et al.*, Nos. 82 B 9841-82 B 9851 (Bankr. N.D. Ill.). Each of these proceedings had as its *raison d'etre* the anticipated flood of asbestos-related personal injury suits which were expected to be filed in the immediate future. The courts dealing with these reorganizations have, therefore, been starkly confronted with the issue of whether a Chapter 11 reorganization can efficaciously be implemented by taking into account and addressing future asbestos-related claims. Although the issue, at this juncture, has turned mainly upon whether a representative or *guardian ad litem* can be appointed for putative asbestos-related claimants on the rationale that such persons can be treated as "parties-in-interest" under Section 1109(b), each court has recognized that the extent to which meaningful Chapter 11 reorganizations can be consummated will, in large part, depend upon whether future asbestos-related claims can be dealt with and discharged in reorganization.

In the absence of a clearly-defined legal rule on dischargeability, the courts considering these pending Chapter 11 reorganizations have taken varying and inconsistent positions. For example, in *In re UNR Industries, Inc.*, 29 Bankr. 741 (N.D. Ill. 1983), *appeal dismissed*, 725 F.2d 1111 (7th Cir. 1984), the district court denied an application for the appointment of a legal representative for such unknown putative asbestos-related claimants. The district court reasoned (as did the court below) that, because those putative claimants do not have a technical cause of action until their asbestos-related diseases have become manifest, there was no claim, contingent or otherwise, which could be discharged and therefore, "[a]ppointing a legal representative to assert claims which are not cognizable under the statute would be fruitless and a waste of the assets of the estate." 29 Bankr. at 746. Yet, the court recognized the basic infirmity of its own holding when it explained that the "putative claimants may wind up with judgments against corporations left with only one asset; a corporate charter." *Id.* at 748. Furthermore, though the Seventh Circuit dismissed the appeal

from the district court's decision on jurisdictional grounds, it expressed serious reservations about the holding. *In re UNR Industries, Inc.*, 725 F.2d 1111, 1119 (7th Cir. 1984).

On the other hand, the Third Circuit in the Amatex proceedings and District Judge Burton R. Lifland presiding over the Johns-Manville Chapter 11 proceedings disagreed with the district court in *UNR*. In *In re Amatex Corporation*, 755 F.2d 1034 (3d Cir. 1985), the Third Circuit determined that putative future claimants could have a representative appointed to represent them, in contrast to the *UNR* district court's apparently clear holding that such persons did not have cognizable "claims" and therefore could not be affected by the debtor's Chapter 11 proceedings. The inconsistency between the Third Circuit's holding in *Amatex*, where the tribunal granted future claimants representation in the debtor's Chapter 11 proceedings, and in *Schweitzer*, where the court held that disposition of such future claims was beyond the power of a bankruptcy court, is manifest.[7] In *In re Johns-Manville Corporation*, 36 Bankr. 743 (Bankr. S.D.N.Y. 1984), *appeal dismissed*, 39 Bankr. 234 (S.D.N.Y. 1984), *appeal permitted*, 45 Bankr. 833 (S.D.N.Y. 1985), Judge Lifland likewise held that, whether or not such putative claimants held dischargeable claims, they did constitute legitimate parties-in-interest within the meaning of Code Section 1109(b). Though he did not adjudicate the specific issue of dischargeability, Judge Lifland recognized that "any plan of reorganization must necessarily

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7 In the same vein, the decision below is also inconsistent with the majority of courts—including the Third Circuit—which have held that mere "exposure" to asbestos may trigger insurance coverage. *See, e.g., Acands, Inc. v. The Aetna Casualty and Surety Company, et al.*, Nos. 83-1927/28 (3d Cir. June 17, 1985); *Insurance Company of North America v. Forty Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814, *cert. denied*, 454 U.S. 1109 (1981); *Keene Corp. v. Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Porter v. American Optical Co.*, 641 F.2d 1128 (5th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981). *But see, Eagle-Picher Industries v. Liberty Mutual Insurance Co.*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983).

balance the rights and needs of prepetition creditors against the anticipated rights and needs of postpetition creditors with Manville's purportedly limited assets and further economic prospects apportioned accordingly." 36 Bankr. at 749.

The foregoing decisions demonstrate logical inconsistency and show beyond cavil a clear sense of judicial concern about whether and how such putative asbestos claimants can and should be addressed in bankruptcy reorganizations under Chapter 11 of the Bankruptcy Code.[8] Until a uniform rule of law is enunciated, these and other pending Chapter 11 reorganizations may proceed upon fundamentally different legal premises. The decision of the court below, which likely will be relied upon as precedent that such putative asbestos-related claims

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8 The divergent views and approaches of the lower courts with respect to the dischargeability of these asbestos-related claims is perhaps best exemplified by the opinion in *Johns-Manville*. At one point, the court states:

> "[I]t is imperative that such a nationwide standard declare that for purposes of allowability, a claim accrues, measured in some form from the point of discovery or manifestation of a disease in conformity with a great weight of authority favoring this position and the logic contained therein." 36 Bankr. at 751, n.4.

However, in rebuking the decisions of the district court in *UNR* and Judge King (the District Judge whose decision was reversed by the Third Circuit in *Amatex*), the court subsequently seems to argue that such future tort "claims" are, nevertheless, dischargeable in bankruptcy:

> "It is the view of this Court that the declaration by Judges Hart and King that these future claims are nondischargeable in bankruptcy are based on superannuated and considerably narrow notions of what constitutes a claim dischargeable in bankruptcy. These notions are at odds with the expanded definition of "claim" contained in Section 101(4) of the Code.
>
> * * *
>
> "Accordingly, the *Amatex* and *UNR* Court refusal to declare future claims cognizable in bankruptcy not only ignores the reality of their existence and importance, but also runs contrary to Congress' intention in drafting Code Section 101(4) that all obligations of the debtor should be dealt with in a Chapter 11 case." 36 Bankr. at 754-755, n.6.

cannot be affected by a pending reorganization, may, at the very least, inject substantial new confusion and uncertainty, and, at worst, make a meaningful reorganization of Johns-Manville, Amatex and UNR impossible. Prompt review by this Court would not only rectify an erroneous decision, which fundamentally challenges the underlying legal premises and economic compromises which formed the basis for the Section 77 reorganizations of the Northeast railroads, it also would reconfirm to Bankruptcy Courts the broad scope of their mandate to carry out final reorganizations of corporate debtors.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals below upon plenary briefing and argument.

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APPENDIX

STATUTES INVOLVED

Bankruptcy Act of 1898
11 U.S.C. § 11, *et seq.* (repealed)

Section 77(b)(3)
(11 U.S.C. § 205(b)(3))

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. . . .

Section 77(f)
(11 U.S.C. § 205(f))

Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed whether or not approved, including creditors who have not, as well as those who have, accepted it.

* * *

The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper

and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. . . .

Bankruptcy Reform Act of 1978
11 U.S.C. § 101, *et seq.*

Section 101(4)
(11 U.S.C. § 101(4))

§ 101. *Definitions.* In this title

* * *

(4) "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured. . . .

Section 1109(b)
(11 U.S.C. § 1109(b))

§ 1109. *Right to be heard.*

* * *

(b) A party in interest, including the debtor, a trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

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(3)

No. 84-2008

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

READING COMPANY
AND
CENTRAL JERSEY INDUSTRIES, INC.,
Petitioners

v.

JOSEPHINE SCHWEITZER, ET AL.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION OF AMATEX CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF IN SUPPORT OF THE PETITION OF READING COMPANY AND CENTRAL JERSEY INDUSTRIES, INC. FOR A WRIT OF CERTIORARI

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MOTION OF AMATEX CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Amatex Corporation ("Amatex") hereby respectfully moves for leave to file the attached Brief *Amicus Curiae* in support of the Petition for Writ of *Certiorari* filed by the Reading Company in this case. The consent of the respondents was requested but refused. The interest of Amatex in this case arises from the fact that it is a debtor in a bankruptcy proceeding presently pending in the United States Bankruptcy Court for the Eastern District of Pennsylvania in which the same issue is before the Court, namely whether persons who have suffered latent asbestos injuries prior to bankruptcy have "claims"

which must be provided for in a plan of reorganization or liquidation and, correspondingly, whether such claims are dischargeable in bankruptcy.

The interest of Amatex Corporation further arises from the fact that the Court of Appeals for the Third Circuit has ruled in its case that latent asbestos injury plaintiffs are entitled to be represented by a guardian *ad litem* in all phases of the bankruptcy proceeding. *In re Amatex Corporation*, 755 F.2d 1034 (3d Cir. 1985).

The decision of the Third Circuit in this case, by a different panel, that latent asbestos injury plaintiffs do not have "claims" cognizable in bankruptcy, undermines the purpose for which a guardian *ad litem* has been appointed in the *Amatex* case.

Respectfully submitted,

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STATEMENT OF AMATEX'S INTEREST IN THE CASE

Amatex Corporation ("Amatex") has an interest in this case because the holding of the court below threatens its very survival and the future of all of its employees. The holding of the court below, if allowed to stand, may render impossible the reorganization of Amatex, Johns-Manville or any company which is a mass toxic tort defendant.

Amatex is a small manufacturer of fire retardant asbestos cloth used primarily in protective clothing. Since November 1, 1982, when it was forced to file for protection under Chapter 11 of the Bankruptcy Code, Amatex has been struggling to reorganize in the face of some 10,000 lawsuits which have been commenced against it as a co-defendant with Manville and other asbestos manufacturers. Amatex expects that another 20,000 lawsuits may be filed against it in the future by persons alleging that their contact with its products in past years has resulted in disease (hereinafter referred to as "latent asbestos injury plaintiffs," "future claims" or "future tort liability").[1] It is clear that neither Amatex nor any other asbestos manufacturer can survive if its future tort liability cannot be managed in a bankruptcy proceeding.[2]

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1. *See* A. Walker, *Projections of Asbestos-Related Disease, 1980-2009*, a final report prepared for the Johns-Manville Corporation and discussed in Congress: reprinted in *Oversight Hearing on the Effect of the Manville and UNR Bankruptcies on Compensation of Asbestos Victims: Hearing Before the Subcommittee on Labor Standards, Committee on Education and Labor, House of Representatives*, 97th Cong., 2d Sess. 23-51, held September 9, 1982.

2. Proofs of Claim filed against Amatex in the Bankruptcy Court indicate total claims to be $6,740,294,500. Amatex's assets, valued at going concern values, amount to approximately $5,200,000 and its remaining insurance coverage amounts to approximately $9,000,000. All of the reorganization plans proposed in the Johns-Manville bankruptcy proceeding are conditioned on the ability of the company to secure an order freeing the surviving or successor company from all liability to future asbestos claimants. In re *Johns-Manville Corporation*, Case Nos. 83B 11656-11676, plan of reorga-

Amatex has always recognized that it cannot secure a discharge for its future tort liability through bankruptcy unless its plan of reorganization sets aside a portion of its assets or equivalent values for the future plaintiffs.[3] Furthermore, Amatex has consistently argued that the analogy between a bankruptcy proceeding and a proceeding involving beneficial interests in a trust or estate is so compelling that these unknown claimants must be represented by a guardian *ad litem* as a matter of due process. A determination that future plaintiffs do not have "claims" cognizable in bankruptcy means that their claims will survive the bankruptcy, but it also means that they cannot be provided for in a plan of reorganization or in liquidation. The conclusion that their claims will not be discharged in bankruptcy may be

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NOTES (*Continued*)

nization proposed by Manville Corporation dated October 17, 1983, Article VI, pages 38 to 39; *see* proposal made by Leon Silverman, Esquire, Legal Representative for future claimants appointed by the Bankruptcy Court pursuant to its opinion rendered in *In re Johns-Manville Corporation*, 36 Bankr. 743 (Bankr. S.D.N.Y. 1984): *Proposal of Legal Representative for Future Asbestos Health Claimants for Principal Elements of a Plan of Reorganization*, 1985 Stockholders & Creditors News Serv. 3711 (Andrews May 8, 1985).

3. On March 1, 1983 (within the 120 day exclusivity period allowed by the Bankruptcy Code), Amatex filed a Plan of Reorganization. The plan proposed that Amatex would (1) create an irrevocable trust for the benefit of both existing and future asbestos claimants, and (2) pay to the trustee of the trust certain fixed cash payments, in annually escalating amounts for the next twenty years, whose present value was intended to equal or better the liquidation value of Amatex's assets. In addition, Amatex proposed to transfer to the trustee all of its rights in the remaining insurance coverage and to cooperate with the trustee in an attempt to persuade its insurance carriers to contribute to the trust the remaining balances in its coverage plus additional amounts representing the saving in defense cost which would result if Amatex's plan were confirmed and all latent asbestos claims were transfered to the trust fund.

small solace to these plaintiffs if, as a result of the continuing mass tort liability, the company cannot reorganize, is liquidated and the assets are distributed to the existing plaintiffs and trade creditors leaving future plaintiffs with a right of action against an empty shell.

On February 22, 1985, Amatex won a major victory in its battle to survive when the United States Court of Appeals for the Third Circuit ruled that latent asbestos injury plaintiffs are entitled to be represented by a guardian *ad litem* in all phases of the bankruptcy proceeding. *In re Amatex Corporation*, 755 F.2d 1034 (3d Cir. 1985). Although the Third Circuit declined in the *Amatex* case to rule on the question whether latent asbestos injury plaintiffs have "claims" cognizable in bankruptcy, it recognized that future plaintiffs will be vitally affected by the resolution of that question in the bankruptcy proceeding.

It is clear from the opinion of the court in the *Amatex* case that it thought that the guardian *ad litem* must be given an opportunity to address the fundamental issue whether the persons he represents have "claims":

> Moreover, by terming future claimants parties in interest we do not prejudge the difficult questions of whether and how to protect their interests more effectively . . . . Much more information must be gathered before it can be determined how to provide most equitably for all concerned . . . . The bankruptcy court, with its factfinding capabilities, appears to be the proper forum to gather the relevant evidence and resolve these difficult issues in the first instance.

755 F.2d at 1043-44.

On March 29, 1985, a different panel of the same circuit court announced its opinion in this case. Although this case arose under the railroad reorganization provisions of the Bankruptcy Act, the court construed similar language defining "claims" under the Act, as not

including claims of persons who have suffered latent asbestos injuries prior to bankruptcy but who have not yet had any manifestation of a disease. The decision of the court in this case undermines the role of the guardian *ad litem* in *Amatex* and affects Amatex's ability to reorganize.

SUMMARY OF ARGUMENT

Amatex urges the Court to grant review of this case for the following reasons:

1. The view of the court below that latent injuries cannot be recognized as "claims" in a bankruptcy proceeding if generally adopted and applied under the Bankruptcy Code will seriously hinder successful reorganization for companies faced with mass tort liability and may force a significant segment of American industry to be liquidated.

2. No useful policy is served by such a holding, particularly since Congressional intent and the policy of the Bankruptcy Acts favor reorganization over liquidation. In addition, although the future rights of action of latent injury plaintiffs will be preserved *de jure* against discharge, *de facto* most of them will be destroyed because the defendant companies will be liquidated. Moreover, if liquidation is inevitable, present plaintiffs are not served by such a holding because so long as future claims remain outstanding the assets of the debtor cannot be sold as a going concern for fear of successor liability. Such assets will have to be sold, if at all, piecemeal at distress values.

3. This case was not a case in which a decision so adverse to future claims should have been rendered. The Reading Company was not threatened by mass toxic tort liability. It was not threatened by inevitable liquidation because of such liability. There was evidence in the record that officials of the old Reading Company were aware that some of its employees might have claims against the

company for exposure to asbestos. *Schweitzer v. Consolidated Rail Corp.* 36 Bankr. 469, 472 (E.D. Pa. 1984). The Reading, however, did not seek representation for such claims nor attempt to give them notice nor did it provide for them in its plan of reorganization. Thus, regardless of whether persons who have latent asbestos injuries have claims cognizable in a bankruptcy proceeding, the claims of the Reading plaintiffs could not have been discharged because of a fundamental lack of due process. *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950).

4. Cases such as *Amatex* and *Manville* present a different situation since the expected future plaintiffs are not former employees and cannot, therefore, be readily identified or given personal notice. The lower courts seem mistakenly to believe that difficulties of notice compel the exclusion of such future plaintiffs from participation in the bankruptcy estate as claimants. This Court should make clear that due process cannot be given the ironic twist of excluding persons from sharing in a bankruptcy estate when there is a serious risk that nothing will be left for them in the future.

5. The *Amatex* case in which a guardian *ad litem* has been appointed for latent asbestos injury plaintiffs and in which the debtor is seeking to provide for these claims in its plan of reorganization furnishes a more appropriate context in which the issue of future claims should be explored and resolved. This case, which involved that issue only tangentially, which did not present the hard realities of a choice between some provision being made for future claims and no provision at all, and in which the real parties in interest, namely the thousands of latent asbestos tort victims, were not represented, is not the forum in which these issues crucial to American industry should have been decided.

6. Although the decision of the Third Circuit in the instant case construes the provisions of the old Bankruptcy Act, it is unlikely, as a practical matter, that the

Third Circuit will take a different view of the meaning of "claims" under the Bankruptcy Code. Because of its limited financial resources Amatex may not be in a position to secure redress in its own case particularly if it is then pressed by a plan of liquidation or is unable to withstand a motion to convert to chapter 7.

ARGUMENT

1. The Statutory Interpretation Of The Bankruptcy Act By The Lower Court Is Contrary To Congressional Intent And May Result In The Liquidation Of Amatex And Other Companies Causing Serious Repercussions Throughout The American Economy.

A decision that persons who have come in contact with a toxic product of the debtor prior to bankruptcy but who have no manifestation of a disease until afterwards are not "claimants", has the following undesirable consequences:

First, the debtor cannot make any provision for such future claims in the plan of reorganization. This is a point which has eluded the court below. The court below has intimated that even if the future claimants have no "claims", a portion of the assets of the debtor may still be set aside for them.[4] This is simply wrong as a matter of law.

Second, the debtor will not be discharged from liability to such future claimants. In the case of most of the mass tort defendants, including Manville, if the debtor cannot be discharged and its assets cannot be freed from liability in the hands of a successor, it will mean that the business of the debtor cannot be saved and will have to be liquidated.

Third, future claimants will not be entitled to share in any of the proceeds of liquidation.

---

4. *Schweitzer v. Consolidated Rail Corporation* 758 F2d 936, 944 n.l (3d Cir. 1985).

Fourth, the fact that future claims are not discharged will mean that the assets of the company will have to be sold piecemeal at distress value since no one will be able to afford to purchase the assets as a going concern for fear of successor liability. Ironically, therefore, the present plaintiffs may not be served by an attempt to exclude future plaintiffs from a share of the debtor's estate.

The new Bankruptcy Code expressly refers to "contingent" and "unmatured" claims in its definition of "claim", Bankruptcy Code §101(4)(A), 11 U.S.C. §101(4)(A) (1982). Although the definition of "claim" in the Bankruptcy Act construed by the lower court in the instant case was not as explicit, the court below recognized that the words "or other interests of whatever character" have been read by judicial construction to include contingent and unmatured claims. It nevertheless held that such claims do not include any subclinical injuries which have not yet matured into a cause of action.

In holding that the moment when a "claim" arises in bankruptcy is the same as the moment when a cause of action "accrues", the court below misunderstood the policies that are involved. The bankruptcy acts are concerned with identifying the persons who should share in the bankruptcy estate and who should have a voice in its disposition. All of the cases which have hitherto addressed the question when a cause of action "accrues" are concerned with identifying the point at which the statute of limitations begins to run. Of course state statutes of limitations are generally interpreted to preserve latent injury claims to avoid unjustly depriving claimants of their claims. As this court observed in *Urie v. Thompson*, 337 U.S. 163 (1949), it is manifestly unfair to allow the statute to run unless a plaintiff is sufficiently aware of his injury to commence an action.

However, this same policy, applied in the bankruptcy context, supports the conclusion that the existence of a "claim" should be based upon the existence of

the injury, rather than its later manifestation. This is so because if these potential plaintiffs are held to have post-petition claims based upon the date of manifestation, they will receive nothing. The very existence of post-petition claimants will prevent reorganization, forcing the debtor company to be liquidated. The debtor will become an empty shell. There will be no surviving company against whose assets the post-petition claimants will be able to recover. Therefore, the same policy of avoiding the unjust destruction of a claimant's rights, supports a holding in the bankruptcy context that such latent injury plaintiffs have "claims."

Furthermore, it is not true to say that state law will not recognize the existence of a claim prior to the manifestation of an injury. In a recent case, *Moore v. Jackson Park Hospital*, 95 Ill. 2d 223, 447 N.E.2d 408 (1983), the Illinois Supreme Court had to consider the effect of a statute which purported to bar all rights of action arising out of a medical procedure brought more than four years after the date of the procedure. The court refused to allow retroactive application of the statute to a plaintiff who was injured in an operation prior to the effective date of the statute but whose injury did not become manifest until after the statute went into effect. It rejected the argument that the plaintiff had nothing which required any protection prior to the date when the injury became manifest:

> We do not agree that a cause of action is nonexistent prior to the time of accrual. Logic dictates that a plaintiff cannot bring a cause of action until he knows or reasonably should know of his injury, and also knows or reasonably should know that the injury was caused by the wrongful acts of another. However, that does not mean that the plaintiff does not have an existing cause of action of which he is unaware.

447 N.E.2d at 412.

In any event, the purposes for which "claims" need to be identified in a bankruptcy proceeding are wholly different from the purposes informing the choice of a time for the running of a statute of limitations.

A bankruptcy proceeding is in essence an equitable proceeding to administer the estate of the debtor and to allocate its value among all persons who have "claims" against the debtor that arose prior to the bankruptcy filing. *Pepper v. Litton*, 308 U.S. 295, 304 (1939). It is a proceeding *in rem*, *Hanover National Bank v. Moyses*, 186 U.S. 181, 192 (1902); *Katchen v. Landy*, 382 U.S. 323 (1966).

"Claims" are defined in the same way whether the proceeding results in a successful reorganization or whether the debtor is liquidated. The essential scheme of the bankruptcy statutes is to let the claimants decide whether they are better off allowing the debtor to survive than they would be if the debtor were liquidated. The Bankruptcy Court is given the power to force a plan on the claimants but only if it is satisfied that the plan is "fair and equitable" to them all. One of the tests applied by the courts in this regard is whether under the plan each claimant receives money or property of a value at least equal to the value he or she would have received if the debtor were liquidated. This test is codified in Section 1129(a)(7) of the Bankruptcy Code, 11 U.S.C. §1129(a)(7) (1982).

Thus the decision to deny them status as "claimants" means that latent asbestos injury plaintiffs will have no voice in the decision whether a company should live or die and no right to share in the bankruptcy estate, either through a plan of reorganization or in liquidation.

2. The Lower Court Adopted a Narrow Interpretation of the Statute In The Mistaken Belief that it Was Constitutionally Required

In adopting an unduly narrow construction of "claim" under the bankruptcy statute the court below was motivated by a mistaken view of the requirements of due process set forth in this Court's opinion in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Since the instant case involved the claims of former employees, the court below correctly concluded that the Reading Company had the means at hand and therefore the obligation to attempt to identify the persons who might have been injured and to give them notice before their claims could be discharged. Somehow, however, its concern that the notice required under *Mullane* may have been difficult or impossible to give, led the court to the conclusion that these persons have no "claims" within the meaning of the bankruptcy statute. This conclusion is simply wrong. As will appear below, *Mullane* does not require that personal notice be given to every person whose claim may be affected by a decree but only requires that a reasonable effort be made to reach all persons so affected by the best means available under the circumstances.

It is clear that the Reading did not meet these requirements. It did not search its records to ascertain the names of its former employees and their addresses and make reasonable efforts to contact them personally, nor, to the extent that such persons could not have been easily identified, did it attempt to reach them by publication or seek the appointment of a guardian *ad litem* for them.

The simple answer in this case, therefore, was that the claims of these employees could not have been discharged by the bankruptcy decree. Failure of constitutionally mandated notice is no argument for limiting the

persons who can be recognized as claimants in a bankruptcy proceeding.

The only way in which the decision below can be explained would be to say that the court meant to hold that persons whose injuries have not become manifest are so unlikely to respond to any form of notice that the constitutional requirements of notice cannot be met as to them under any circumstances. This is tantamount to saying that courts are powerless to adjudicate the rights of persons who are not likely to respond to even the best designed notice. That conclusion is manifestly incorrect.

Unborn beneficiaries of a trust or an estate are not capable of responding to notice, yet chancellors have for centuries adjudicated the rights of such beneficiaries when it was necessary to do so to declare the rights of living beneficiaries. The problem of notice has been solved, as far back as the Year Books of Edward II, by appointing a guardian *ad litem* for such persons.[5] When a guardian *ad litem* has been appointed for unborn beneficiaries of a trust it has never been seriously suggested that their rights cannot be affected because they are personally incapable of responding to notice. What is not permissible is for a court to proceed to adjudicate the rights of such beneficiaries without appointing a guardian *ad litem* for them. *McArthur v. Scott*, 113 U.S. 340 (1885). A bankruptcy proceeding is, in effect, a proceeding to administer an estate or a trust. The creditors or claimants are the beneficiaries.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) supports the conclusion that the rights of beneficiaries who may not be capable of responding to notice can be adjudicated if a guardian *ad litem* is appointed for them. Although that case is usually noted for its holding that personal notice by mail must be given to

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5. Year Book III, 4 Ed. II, at 191 (Selden Society); W. Holdsworth, *History of English Law* 317 (4th Ed. 1936); *Hatch v. Riggs National Bank*, 361 F.2d 559 (D.C. Cir. 1966).

all beneficiaries whose addresses are known or can be reasonably discovered by due diligence, *Mullane* also dealt with the requirements of notice when the beneficiaries are unknown. Some of the beneficial interests in the trusts and estates that constituted the common trust fund in *Mullane* were held by persons who were yet unborn. *See In re Central Hanover Bank & Trust Co.*, 75 N.Y. S.2d 397, 399 (Surr. Ct. N.Y. County, 1947). A guardian *ad litem* was appointed to represent all absent beneficiaries. 339 U.S. at 306. Mullane, the appellant, was the guardian *ad litem*. This Court approved notice by publication as to those beneficiaries whose whereabouts were unknown (including, presumably, the beneficiaries not yet *in esse*) in the following words:

> "This Court has not hesitated to approve or resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. . . . .
>
> "Those beneficiaries *represented by appellant* whose interest or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient. However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable.

339 U.S. at 317 (emphasis added).

Persons who are not likely to respond to any form of notice, of course, should not be foreclosed by any present judicial proceeding if their rights can just as well await future identification and adjudication. There are cases, however, where the judiciary does not have the luxury to wait until unidentified claimants assert themselves. Such is the case when claims to a limited fund are

involved.[6] To award the fund entirely to persons who have identified themselves, when it is known that there are other persons not presently identifiable who have an interest in the fund, merely because notice cannot be given to such others is the essence of irony:

> [I]n cases in which contingent tort claims exceed firm value, a blind invocation of due process notice constraints will defeat the economic interest of those whom the notice requirements are invoked to protect . . . . Surely due process cannot deny the assertion in bankruptcy of a future claim in the face of a serious risk that little or nothing will be left to satisfy the claim when it is eventually reduced to judgment. Due process cannot be so ironically self-defeating.

Roe, *Bankruptcy and Mass Tort*, 84 Colum. L. Rev. 846, 901 (1984).

Thus the difficulty of giving notice to all latent asbestos claimants cannot be a reason for excluding them from participation in the bankruptcy estate. The policy reasons which favor including them as claimants are compelling. The oft expressed concern that such recognition will allow manufacturers of defective products to cleanse themselves of future claims with impunity is simply misinformed. As the above discussion shows, a debtor cannot secure a discharge from future claims unless it is prepared to recognize their existence, secure the appointment of a guardian *ad litem* for them, and make provisions for them satisfactory to the guardian and to the court.

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6. Thus it has been recognized that in cases falling within Fed. R. Civ. P. 23(b)(1)(B), where claims are asserted against a limited fund, a class can be properly constituted even if all members of the class are not amenable to personal notice. The right of a member of the class to conduct his or her own lawsuit and the right to withdraw from the class may have little value if the fund is distributed to others and therefore notice is less important than is representation. 3B J. Moore, *Moore's Federal Practice* ¶¶23.35[2], 23.55 (2 ed. 1985).

In the instant case, there is no question that the then-future claimants received no notice, nor were they represented, at the time of the company's reorganization. Due process, therefore, requires that their claims remain viable against the reorganized company. The Third Circuit could thus have based its decision on valid constitutional due process grounds. Instead, in a mistaken belief that it was acting to preserve the interests of latent injury plaintiffs, it chose to interpret the statute in a way which prejudiced the very purpose for which a guardian *ad litem* was appointed in the *Amatex* case.

CONCLUSION

A question critical to the survival of a significant segment of American industry has been decided in this case. The court below held that claims of persons who have sustained latent injuries in the past which have not manifested themselves on the date of bankruptcy are not "claims" within the meaning of the railroad reorganization provisions of the Bankruptcy Act and cannot be discharged in a reorganization. If such claims cannot be provided for and managed in a bankruptcy proceeding, companies which have been forced into bankruptcy because of the assertion against them of a mass tort liability will not be able to reorganize and will have to be liquidated.

This case involved a company which had successfully reorganized because there was no general awareness at the time of its reorganization that there were any outstanding latent injury claims. The company, therefore, did not attempt to provide for these claims in its plan of reorganization, did not seek any representation for them and did not make any effort to give them notice. Furthermore, unlike Amatex and other asbestos manufacturers currently in Chapter 11, the company was not facing the prospect of liquidation because of its mass tort liabilities. It was, therefore, not a case which raised

squarely the question whether latent injury claims should be recognized as "claims" and thus be guaranteed a share of the debtor's estate or whether they should be denied that status and be forced to take the chance that the debtor will survive. This was not the case in which that fundamental question should have been decided.

Instead of facing the constitutional due process question, the lower court attempted to resolve the case before it by statutory construction. This attempt to skirt the constitutional problem resulted in a statutory interpretation which will hinder the administration of the bankruptcy laws. If allowed to stand and followed in other circuits, the Third Circuit's view that an individual with a latent injury cannot have a "claim" in a bankruptcy proceeding may preclude the successful reorganization of any company that is forced into bankruptcy by the assertion against it of mass tort liability. The result will be to deny any recovery to future plaintiffs against such companies without increasing the recovery to present plaintiffs, and to hasten the loss of industries and jobs which will ultimately have an impact on the public and the economy of the United States.

Respectfully submitted,

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In The Supreme Court of the United States

OCTOBER TERM, 1984

READING COMPANY
AND
CENTRAL JERSEY INDUSTRIES, INC., PETITIONERS

v.

JOSEPHINE SCHWEITZER, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY MEMORANDUM

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QUESTIONS PRESENTED

1. Whether a reorganization court has the power to deal with and provide for latent future asbestos-related toxic tort claims as part of a reorganization of a debtor corporation under Section 77 of the Bankruptcy Act?

2. Whether, assuming that a reorganization court has such authority, the court may bar such future claims, where the rail operations out of which such claims arose are, during the course of the reorganization, transferred to a solvent successor railroad?

DESIGNATION OF CORPORATE RELATIONSHIPS

The Designation of Corporate Relationships set forth in Petitioner's Petition for Certiorari (Pet. III) is incorporated herein by reference.

No. 84-2008

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PETITIONERS' REPLY MEMORANDUM

By focusing on the *ratio decidendi* of the decision below the Respondents seek to depreciate the significance of these cases.

Respondents would have the Court believe, for example, that the Third Circuit found that the "reorganization plans and consummation orders . . . did not make provisions for such [the subject FELA] claims." (Brief in Op. 6-7). It is true that the Respondents in the District Courts and Court of Appeals strenuously argued for an interpretation of various specific provisions of the Reading and CNJ reorganization plans and consummation orders which would defeat Petitioners' defenses of discharge in bankruptcy. But the opinion of the Court of Appeals does not mention these issues, much less adjudicate them in favor of Respondents.

The Court of Appeals avoided the need to deal with these, or indeed any other, subsidiary issues by focusing exclusively on the broadest possible statutory construction question. There is no need to speculate as to the approach taken by the Court of Appeals, because the court clearly expressed its approach as follows:

> "The district courts in these cases were presented with the difficult question of whether plaintiffs, who allege that they were exposed to asbestos prior to their employer's reorganization and did not manifest any injury until after the relevant consummation dates, had 'claims' that were discharged in the reorganization proceedings. The courts concluded in the affirmative, necessarily relying for this conclusion on the determination that plaintiffs did have dischargeable 'claims' within the meaning of section 77. We shall now consider whether this determination was error." (App. 11a-12a).

Respondent may have preferred that the Court of Appeals decide these cases on a narrower ground, but the Court of Appeals expressly elected to reach and confine its decision to the broadest possible issue in these cases, i.e. whether "plaintiffs did have dischargeable 'claims' within the meaning of section 77."

For the reasons set forth in the Petition, the consequences of that decision raise important and troublesome questions of bankruptcy administration warranting further consideration by this Court.

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